UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-REGIONAL DIRECTOR,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**DEFENDANT-RESPONDENT'S MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	)	

Pursuant to 28 U.S.C. §§ 1920, 1927, 2412, and the Court's inherent authority, Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's") respectfully moves for an award of reasonable attorneys' fees, costs, and expenses incurred in the defense of this unjustified action, all of which should be charged to Plaintiff-Petitioner National Labor Relations Board ("NLRB"), as well as Garey Lindsay, Eric Taylor, Linda Finch, and Naomi Clark, acting in their official capacities on behalf of Region 9 of the NLRB (collectively "Petitioner").[1] The attached Memorandum in Support, as well as the civil record in this case and portions of the NLRB's investigative record in Case No. 09-CA-184215, show that an award for Mike-sell's in the form of an award of attorneys' fees, costs, and expenses is warranted.

Respectfully submitted,

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[1] Eric Taylor did not attend the hearing in this matter, but he was listed on this Court's Docket as a "Lead Attorney" and an "Attorney to be Noticed." Conversely, Naima Clark represented Petitioner at the hearing in this matter, although she was not listed on this Court's Docket as representing Petitioner.

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CERTIFICATE OF SERVICE

I hereby certify that Defendant-Respondent's Motion for Attorneys' Fees, Costs, and Other Expenses was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following, with hard copies served as follows on this 26th day of June, 2017:

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PLAINTIFF-REGIONAL DIRECTOR,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**DEFENDANT-RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	)	

Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") respectfully moves for an award of attorneys' fees, costs, and expenses under 28 U.S.C. §§ 1920, 1927, 2412, and the Court's inherent authority. This Motion is based on the unjustified Petition for 10(j) Injunction ("Petition") filed by Plaintiff-Petitioner National Labor Relations Board ("NLRB"), as well as Garey Lindsay, Eric Taylor, Linda Finch, and Naomi Clark, acting in their official capacities on behalf of Region 9 of the NLRB (collectively "Petitioner"),[1] seeking to force Mike-sell's to engage in decisional bargaining and produce information requested for that purpose to Charging Party International Brotherhood of Teamsters, Local Union No. 957 ("Union"). The Petition clearly called for a ruling on the merits and, if granted, would have duplicated NLRB proceedings. The Petition also sought grossly overbroad and unduly burdensome relief that would subject Mike-sell's as well as innocent third parties to grave hardship without a finding of liability. Not only did Petitioner fail to prove that a 10(j) injunction was necessary to preserve the NLRB's remedial power, but Petitioner's request for relief extended so far beyond the realm of reasonableness as to have no basis in law or fact. Thus, Mike-sell's is entitled to an award of attorneys' fees, costs, and expenses incurred in defense of the unwarranted Petition.

[1] Eric Taylor did not attend the hearing in this matter, but he was listed on this Court's Docket as a "Lead Attorney" and an "Attorney to be Noticed." Conversely, Naima Clark represented Petitioner at the hearing in this matter, although she was not listed on this Court's Docket as representing Petitioner.

FACTUAL BACKGROUND

I. Background Facts

Mike-sell's is a privately-held manufacturer of snack foods headquartered in Dayton, Ohio. (ECF 5-1, ¶ 3.) For over 100 years, Mike-sell's has manufactured and packaged products at its Dayton plant and distributed them to retailers in Ohio, Indiana, Kentucky, Illinois, Michigan, and Pennsylvania through the help of route sales drivers ("drivers") and independent distributors ("distributors"). (ECF 5-1, ¶ 4.) Company drivers are represented by the Union and are employed as part of the Company route sales division. (ECF 5-1, ¶ 5.) Their employment was formerly governed by a labor agreement effective November 17, 2008, to November 17, 2012 ("Expired Contract"). (ECF 5-1, ¶ 8.) From November 18, 2012, through June 12, 2013, drivers worked under the Company's unilaterally-implemented last, best, and final offer ("Final Offer").[2] (ECF 5-1, ¶ 9.) Since June 13, 2013, however, drivers have worked under the Company's revised last, best, and final offer ("Revised Final Offer"), which Mike-sell's contends was lawfully implemented after the parties reached a good faith impasse in June 2013.[3] (ECF 5-1, ¶ 10.)

Mike-sell's has been in business for over a century, but since about 2006, significant losses have forced the Company to rethink its business plan.[4] (ECF 5-1, ¶ 11.) As a result, the Company has gradually reduced its Company route sales division by selling certain routes to distributors who purchase the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss—and have the exclusive right to re-sell those products as they see fit to retail and wholesale customers within their designated area.[5] (ECF 5-1, ¶ 14.) On multiple occasions prior to the instant Complaint, the Company notified the Union that it intended to sell

[2] The Company's Final Offer has no relevance to this dispute. The NLRB ultimately found the Company's unilateral implementation of its Final Offer to be unlawful. The NLRB's Order was later enforced by the U.S. Court of Appeals for the District of Columbia Circuit, although the Circuit Court recognized that the situation presented "a close case." *Mike-Sell's Potato Chip Co. v. NLRB,* 807 F.3d 318, 319 (D.C. Cir. 2015).

[3] The NLRB has recognized a "legitimate dispute" over the validity of the Revised Final Offer through the issuance of a Compliance Specification in NLRB Case No. 09-CA-094143, which expressly admits that "a controversy presently exists over whether the parties reached a good faith impasse about June 13, 2013." It is thus clear that the lawfulness of the unilaterally-implemented Revised Final Offer has yet to be determined, so any suggestions to the contrary are misleading and disingenuous.

[4] The main reason for these losses is the competitive imbalance between Mike-sell's and its primary competitors, Frito-Lay and retailer private-label products. (ECF 5-1, ¶ 11.) Unlike Frito-Lay and private-label brands, Mike-sell's cannot afford to intentionally discount its product so deeply as to take a temporary loss in order to steal away coveted shelf space and sales volume from smaller companies. (ECF 5-1, ¶ 11.)

[5] In 2011, Mike-sell's employed about 80 drivers. (ECF 5-2, ¶ 3.) In 2012, the Company closed three distribution centers and sold dozens of routes to distributors, reducing its workforce to around 35 drivers. (ECF 5-2, ¶ 3.) The number of drivers has further declined over the past five years, partially due to the sale of routes and partially due to route mergers/consolidations. (ECF 5-1, ¶ 15.) Mike-sell's currently employs 14 drivers who serve 12 routes. (ECF 5-1, ¶ 15.) The rest of the Company's approximately 174 routes are serviced by 34 distributors. (ECF 5-1, ¶ 15.)

routes to independent distributors, and the Union nether requested to bargain nor filed a grievance or unfair labor practice charge over that decision. (ECF 5-2, ¶ 4-8.)

The Company's inherent right to change distribution methods by selling routes to distributors was confirmed in 2012, through an arbitration award issued by Arbitrator Michael Paolucci ("Paolucci Award"). (ECF 5-2, ¶ 9 and Att. 1.) The Paolucci Award emphasized that Mike-sell's transfers both the risk and potential reward by selling routes to distributors, which distinguishes the situation from typical subcontracting. (ECF 5-2, ¶ 12 and Att. 1, p. 17.) The Paolucci Award further confirmed that Article VIII-B of the Expired Contract—which sets forth rights for drivers displaced when Mike-sell's undertakes to "eliminate a route"—applies equally to routes that are entirely abandoned and to routes sold to distributors. (ECF 5-2, ¶ 13 and Att. 1, p. 20.) And while not requiring route eliminations to be financially justified, the Paolucci Award nevertheless recognized the untenable situation that could result if the grievance were sustained: Mike-sell's could be "forced to keep non-performing assets (in the form of a route)" and "forced to continue a business activity that loses money every day." (ECF 5-2, ¶ 13 and Att. 1, p. 18.)

After the Paolucci Award issued, the Company route sales division continued to flounder.[6] (ECF 5-1, ¶ 16.) Mike-sell's thus relied on the Paolucci Award (as well as controlling law) to eliminate over three dozen more routes after the term of the Expired Contract ended. (ECF 5-1, ¶ 17.) Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects, just as it had in the past. (ECF 5-1, ¶ 17; ECF 17, p. 74-75.) The Union neither requested to bargain nor filed a grievance or unfair labor practice charge over the route eliminations. (ECF 5-1, ¶ 17.)

II. The Sale of Routes in 2016

In April 2016, Mike-sell's announced it may sell more routes to distributors. (ECF 5-1, ¶ 20.) By letter to the Union dated April 27, 2016, Mike-sell's promised to "provide . . . timely notice of its decision" and "honor its obligation to bargain over the effects of the route elimination(s)." (ECF 5-1, ¶ 20.) The Union filed a grievance to challenge the Company's intent to sell additional routes, citing several provisions of the

[6] It is undisputed that Mike-sell's provided the Union with copies of requested Profit-and-Loss Statements for the Company's entire route sales division for recent years, all of which reflect large-scale losses. (ECF 5-1, ¶ 16.)

Expired Contract that would allegedly be violated if any route sales came to fruition. (ECF 5-1, ¶ 20.) However, the Union made no demand to bargain over the issue. (ECF 5-1, ¶ 20.) Although Mike-sell's processed the Union's grievance, there was no labor contract under which to arbitrate. (ECF 5-1, ¶ 20.)

On July 11, 2016, Mike-sell's told the Union in writing of its decision to sell Route 102, covering the area around greater Xenia, Ohio. (ECF 5-1, ¶ 21.) The Union raised no objection to this decision, nor did the Union demand to bargain or file a grievance to challenge it. (ECF 5-1, ¶ 21.)

On August 29, 2016, Mike-sell's notified the Union in writing of its decision to sell Routes 104 and 122, covering territory in Bellbrook and Beavercreek, Ohio. (ECF 5-1, ¶ 22.) The Union filed a grievance to challenge the sale of both routes.[7] (ECF 5-1, ¶ 22.) The Union also sent Mike-sell's a letter demanding to bargain over the decision to eliminate Routes 104 and 122, as well as seeking documents purportedly necessary for the requested decisional bargaining. (ECF 5-1, ¶ 22.)

On September 12, 2016, Mike-sell's replied to the Union's demand, declining to engage in decisional bargaining over elimination of the routes and further declining to produce information requested for the specific purpose of such decisional bargaining.[8] (ECF 5-1, ¶ 23.) The Company explained its position in detail, citing specific passages from the Paolucci Award. (ECF 5-1, ¶ 23.) However, Mike-sell's also reiterated its willingness to bargain over the effects of any route eliminations,[9] as well as its willingness to produce information relevant or necessary for the Union to perform its statutory duty to bargain over mandatory subjects. (ECF 5-1, ¶ 23.)

Also on September 12, 2016, Mike-sell's wrote the Union about its decision to sell Route 131, covering Middletown and Springboro, Ohio. (ECF 5-1, ¶ 25.) The Union filed a grievance over the sale of Route 131,[10] as well as Unfair Labor Practice Charge No. 09-CA-184215 ("Charge"), challenging the elimination of all four

[7] Again, Mike-sell's accepted and processed the grievance, but there was no contract under which to arbitrate. (ECF 5-1, ¶ 22.)

[8] Just a few days earlier, Mike-sell's had already given the Union requested copies of Profit-and-Loss Statements for the Company's route sales division for multiple years. (ECF 5-1, ¶ 23.)

[9] The Union never requested to engage in effects bargaining. (ECF 5-1, ¶ 24.) In any event, the sales of the four routes coincided with drivers' resignations or retirements, so there were no layoffs—just a rebid of routes. (ECF 5-1, ¶ 24.)

[10] As in the past, Mike-sell's processed the grievance, but there was no contract under which to arbitrate. (ECF 5-1, ¶ 25.)

routes since July 2016.[11] (ECF 5, ¶ 3(a-b).) Mike-sell's provided the NLRB with a detailed position statement and other requested documents in response to the Charge, as well as compelling arguments in response to the NLRB's request for the Company's position on the propriety of relief under Section 10(j) of the National Labor Relations Act ("Act"). (ECF 1, ¶ 5; Exhibit A – Shive Affidavit, ¶¶ 3-7 and Atts. 1-5.)

Ultimately, the elimination of Routes 102, 104, 122, and 131 collectively resulted in a one-time liquidation of Company assets, as well as annual savings on both labor and non-labor expenses, resulting in hundreds of thousands of dollars being returned to Company coffers within the first 12 months. (ECF 5-1, ¶¶ 26, 27.) Projecting the 2016 route eliminations to increase the Company's net worth by almost 3.5% in one year alone, Mike-sell's had newfound confidence to reallocate resources and make major improvements in its manufacturing plant. (ECF 5-1, ¶ 28.) The four route eliminations also reduced the time managers spend running routes to cover for unplanned driver absences, a distraction consuming about 55 workdays per year before the route sales but only about 14 workdays per year after the route sales. (ECF 5-1, ¶ 29.) Since recapturing an estimated 41 management workdays—about two full work months—per year, Mike-sell's has been able to significantly increase time dedicated to calling on high-volume clients, selling incremental displays, managing customer relations concerns, updating point-of-sale merchandising and resetting retailer shelves, promoting new products, and generating new accounts. (ECF 5-1, ¶ 29.)

III. The 10(j) Petition and Related Briefing

Despite the Company's factually-detailed and well-reasoned position statements responding to the Charge and proposed 10(j) relief, the NLRB issued a Complaint and Notice of Hearing ("Complaint") on March 17, 2017, seeking (in part) a rescission of the 2016 route sales and setting a hearing date of May 31, 2017. (ECF 1, at Ex. 3.) The NLRB then filed its Petition on April 12, 2017, as well as an accompanying Memorandum in Support, asking that Mike-sell's be forced to "rescind the sale of delivery routes, meet with and bargain with the Union over its decision to sell those routes, and provide the Union with information it requested regarding the sale of those routes." (ECF 1; ECF 1-1, p. 12.)

[11] On December 9, 2016, the Union amended its unfair labor practice charge, limiting the 8(a)(5) allegation of failure to provide information to the Union's information requests related to decisional bargaining over the sale or routes rather than the Union's information requests related to "contract negotiations." (ECF 1, ¶ 3(b).)

But the Petition's request for relief was not limited to the 2016 route sales and the information requested in connection therewith. The Petition instead exceeded the scope of the Complaint by seeking to enjoin Mike-sell's from "[r]efusing to meet and bargain in good faith with the Union over any proposed changes in wages, hours, and working conditions," "[r]efusing to provide the Union with information it requested that is relevant and necessary for it to fulfill its role as the collective bargaining representative," and "[i]n any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their right[s] [under the Act]." (ECF 1, pp. 8-9.) The Petition also sought affirmative relief far beyond that needed to cure the alleged violations, such as by forcing Mike-sell's, within five days, to "meet and bargain with the Union over any proposed changes in wages, hours, and working conditions" and to "bargain collectively with the Union . . . with respect to rates of pay, wages, hours . . . and other conditions of employment . . . ." (ECF 1, pp. 9-10.)

The Petition alleged such drastic relief was immediately necessary to end "a serious flouting of the Act." (ECF 1, p. 7.) Petitioner claimed the 2016 sale of routes threatened to "irreparably undermine employee support for the Union" and "severely erode the 'prestige and legitimacy' of the Union in the eyes of the employees." (ECF 1-1, pp. 13-14.) Petitioner insisted that, "[b]y the time the Board issues the final order . . . it will be too late to preserve employee choice and for the Union to regain its lost support," as "employees will predictably shun the Union because their working conditions have been adversely impacted." (ECF 1-1, pp. 12-13.) As support, Petitioner baldly claimed at least two drivers had already resigned "because they believe [Mike-sell's] will continue to unilaterally eliminate bargaining unit jobs." (ECF 1-1, pp. 5, 13.) The Petition urged this Court to set a briefing schedule and require Mike-sell's to "appear . . . and show cause" why an injunction should not issue. (ECF 1, p. 8.)

The Court issued a Show Cause Order, granting Petitioner's proposed briefing schedule and hearing request in full. (ECF 2.) Per the Court's Order, Mike-sell's filed its Answer to the Petition on April 25, 2017. (ECF 3.) Thereafter, on May 3, 2016, Mike-sell's filed a Memorandum in Opposition to the 10(j) Petition ("Memorandum in Opposition"), summarizing its position and highlighting certain basic facts through affidavit evidence, with the understanding there would be a full and fair opportunity to present live testimony on the "just and proper" standard at a hearing before this Court on May 12, 2017. (ECF 5.)

After having the benefit of reviewing the Company's Memorandum, Petitioner filed a Motion to Adjudicate on Affidavits on May 5, 2017—seven days before the show-cause hearing—asking the Court to forgo live testimony and proceed instead on affidavits. (ECF 10.) The NLRB certainly had the ability to request submission on affidavits alone when filing its Petition a month earlier. But Petitioner conveniently failed to make such a request until two days after Mike-sell's filed its Memorandum, which was based on a strategy crafted in reliance on the Petition's specific request for an evidentiary hearing. The suspicious timing of Petitioner's belated Motion reeked of underhanded gamesmanship, and it forced Mike-sell's to file yet another Memorandum in Opposition in order to avoid significant prejudice to Mike-sell's, as well as innocent third parties. (ECF 14.) This Court ultimately denied Petitioner's untimely Motion to Adjudicate on Affidavits, finding the Company's opposition had merit. (ECF 15.)

IV. The 10(j) Hearing on May 12, 2017

At hearing, Petitioner called five witnesses, none of whom supported the NLRB's claim that the route sales threatened to undermine the Union. (ECF 17, p. 2.) To the contrary, each witness testified that a host of wholly unrelated issues arising from NLRB Case No. 09-CA-094143—unsuccessful contract negotiations, protracted litigation and compliance proceedings, incorrect/inflated backpay calculations, and denials of appeals from compliance determinations—had caused Union support to erode. (ECF 17, pp. 21-24, 33-34, 36, 38, 51-60, 68-74, 76-82, 84-95.) Moreover, not a single witness confirmed Petitioner's bald assertion that any drivers had resigned because of the sale of routes. (ECF 17, pp. 25-26, 33-34, 52-53, 60, 73-74.)

The NLRB's first witness, Union Recording Secretary and Business Agent Alan Weeks ("Weeks"), testified that drivers were "frustrated with everybody" due to "delays . . . between the arbitrations and the hearings and the NLRB and the Union and the Company." (ECF 17, p. 21.) Weeks said drivers were "frustrated at the length of time it's taken to get some of the decisions," as they "feel that the Company has been in violation for years" and "there is no . . . resolution in sight." (ECF 17, pp. 22-24, 42.) On cross, Weeks admitted that drivers' complaints about "delays" were related solely to NLRB Case No. 09-CA-094143, which "had nothing to do with the sale or elimination or routes."[12] (ECF 17, pp. 33-34, 38.) He also conceded drivers

[12] In this vein, Weeks further admitted that Mike-sell's was not responsible for any delay in the issuance of agency or court decisions, and that the Company did not act unlawfully in exercising the right to litigate its position. (ECF 17, pp. 33-34.)

were "pretty upset" by the "big letdown" when the Union hastily posted inflated backpay figures related to Case No. 09-CA-094143, which were issued prematurely by the NLRB and later confirmed to be overstated by about $200,000. (ECF 17, p. 36.) Driver frustration further increased when the NLRB denied the Union's appeal from the written backpay determination, which meant the inflated backpay figures would not be reinstated. (ECF 17, pp. 36-37.) Weeks claimed drivers' attendance at Union meetings had declined, but only "after the award from the NLRB on the backpay for the . . . prior case."[13] (ECF 17, pp. 22-23, 40-43.) Weeks ultimately confirmed that any frustration over the sale of routes was directed toward Mike-sell's—not the NLRB or the Union. (ECF 17, pp. 37-38.)

The NLRB's second witness, Route Sales Driver Jerry Lake ("Lake"), testified that the drivers' main concern was "losing money, [and] putting in more hours," as they were upset with the "changing of the routes more than the sale of the routes." (ECF 17, pp. 51-52, 59-60.) Lake said one driver quit after the 2016 sale of routes because he bumped into a route with too much traffic, and another driver quit after the 2017 route consolidation because he "got a better job." (ECF 17, pp. 52-53, 59-60.) Lake also admitted that the Union meetings in December 2016 and January 2017 were held to discuss issues related to NLRB Case No. 09-CA-094143, including the status of contract negotiations, the global settlement offer proposed by Mike-sell's, and the Union's options with regard to the pending compliance proceeding. (ECF 17, pp. 54-58.) He confirmed that, at these meetings, drivers complained about the delay "with regard to the other Board case," as well as the letdown that occurred "when the union posted a backpay estimate" that was later found to be significantly overstated. (ECF 17, pp. 57-58.)

Petitioner's third witness, Route Sales Driver Robert Hauefle ("Hauefle"), testified that, at a Union meeting in December 2016, another driver expressed frustration in relation to contract negotiations, pending litigation in NLRB Case No. 09-CA-094143, as well as global settlement negotiations—which were the sole topics for the special meeting. (ECF 17, p. 68, 72-73.) Hauefle conceded that the driver's frustration "had nothing to do . . . with the sale of the routes." (ECF 17, pp. 72-73.) Hauefle also confirmed that his own

[13] Ironically, another NLRB witness testified that the bargaining unit has more Union meetings nowadays than it did five years ago, thus suggesting that Union participation within the bargaining unit has increased rather than decreased. (ECF 17, pp. 54-55.)

frustration was due to increased work hours resulting from the March 2017 consolidation of routes—not from the 2016 sale of routes. (ECF 17, p. 74.) Hauefle further contradicted Petitioner's theory about the erosion of Union support, admitting he "wanted to give the Union the opportunity to run through the process, which is a very lengthy process which [he's] learned through past experiences . . . that things don't always happen overnight." (ECF 17, p. 70-71.) Petitioner's fourth witness, Route Sales Driver Gerald Schimer ("Schimer"), generally testified that he has "[w]onder[ed] why [the Union] can't stop the Company from selling the routes," but he never expressed his feelings at any Union meetings. (ECF 17, pp. 79-80.) Schimer offered no evidence that any driver had resigned or left the Union because of the sale of routes. (ECF 17, pp. 76-82.) Although Schimer testified that he had to change routes after the Company sold his former route in September 2016, he neither stated nor implied that he felt adversely affected by this change. (ECF 17, pp. 76-82.)

Petitioner's fifth witness, Route Sales Driver and Union Steward Richard Vance ("Vance"), griped about the "headache" of developing new customer relationships and learning new routes due to rebids after the route sales. (ECF 17, pp. 84-85, 89-92.) He also complained of "driving farther" for a lower-volume route after the 2016 rebid. (ECF 17, pp. 85-86.) Vance claimed drivers had come to him "irate" at some point after the route sales in 2016, emphasizing that "it's been a long five years." (ECF 17, pp. 85-87.) He claimed one driver made "derogatory, disparaging comments about [the Union] business agent and [the Union] attorney," and others "ha[d] expressed [similar] displeasure" at some point "within the last six months." (ECF 17, pp. 86-87.) Vance admitted, however, that Mike-sell's had sold dozens of routes over the past five years, and that his own frustration stemmed more from the March 2017 route consolidation, which increased his work hours. (ECF 17, pp. 92-94.) Vance also admitted that drivers were frustrated because the Union imprudently posted inflated backpay figures before they were finalized by the NLRB, thereby resulting in a "letdown" for the drivers when the figures were reduced by hundreds of thousands of dollars. (ECF 17, pp. 94-95.)

Ultimately, Petitioner presented no evidence whatsoever to support the NLRB's claim that, unless Mike-sell's immediately rescinded its contracts with independent distributors, the Union would lose support. To the contrary, the evidence clearly demonstrated that, although drivers were frustrated by a number of issues, none of them concerned the sale of Routes #102, #104, #122 and #131. The NLRB's witnesses confirmed that

the Company's practice of selling routes to independent distributors had gone on for more than a decade without incident, and no driver ever resigned because of it. (ECF 17, pp. 25-26, 33-34, 52-53, 60, 73-74.)

LAW AND ARGUMENT

I. Policy Considerations and Legislative Intent

The Equal Access to Justice Act ("EAJA") lets small businesses recover attorneys' fees, costs, and expenses if they prevail in a lawsuit filed by the federal government. 28. U.S.C. § 2412(a)-(b); 28. U.S.C. § 1920; 5 U.S.C. § 504; *Caremore, Inc. v. NLRB*, 150 F.3d 628, 629 (6th Cir. 1998). The EAJA was intended to "level the playing field" between the government and small business litigants like Mike-sell's. *See* Pub. L. No. 96-481, 94 Stat. 2325 (1980); *see also* H.R. Rep. No. 99-120 (I), at 2 (1985) ("The Act reduces the disparity in resources between . . . small businesses . . . and the Federal Government."). A wide disparity in financial resources makes small businesses uniquely vulnerable to abuse by federal agencies. *See* H.R. Rep. No. 96-1418, at 10 (1980) ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue."). Small businesses are often deterred from seeking relief or defending unjustified actions, as it is of no value to prevail in court only to be stuck in a "rut" due to litigation costs. *See* H.R. Rep. No. 96-1418, at 1 (1979). By allowing recovery of attorneys' fees and litigation costs under the EAJA, the government is encouraged to carefully scrutinize the merits of its position rather than the financial vulnerability of its target. *See* H.R. Rep. No. 1418, *supra* note 3, at 12 ("By allowing a decision to contest government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation."). If agencies are not deterred, the EAJA can at least reduce the financial handicap in defending unwarranted actions. *See* H.R. Rep. No. 1418, *supra* note 3, at 6 ("The purpose of the bill is to reduce the deterrents and disparity . . . .").

In this case, to avoid being charged with an EAJA award, the NLRB must prove the 10(j) Petition was "substantially justified" and had a reasonable basis in law and fact. *United States v. Real Property Located at 2323 Charms Road*, 946 F.2d 437, 440 (6th Cir. 1991). If Petitioner fails to meet its burden, an award of attorneys' fees, costs, and expenses is warranted. 28 U.S.C. § 2412(d)(1)(a); *Caremore*, 150 F.3d at 629; *see also NLRB v. Cont'l Linen Servs., Inc.*, No. 1:10-CV-562, 2011 WL 2261537, *1 (W.D. Mich. June 8, 2011) (EAJA award of attorneys' fees, costs, and expenses is proper if: (1) claimant prevails; (2) government's

position not substantially justified; and (3) no special circumstances exist); *United States v. Adkinson*, 256 F. Supp. 2d 1297, 1319 (N.D. Fla. 2003), *aff'd,* 360 F.3d 1257 (11th Cir. 2004) (telephone charges, travel time, meals, transcript fees, fax charges, postage, paralegal fees, law clerk wages, and computerized research expenses are compensable under the EAJA); *Poole v. Rourke*, 779 F. Supp. 1546, 1572-73 (E.D. Cal. 1991) (photocopy charges, long distance telephone charges, travel expenses, postage/shipping charges, court filing fees, and air courier costs are compensable under the EAJA).

While the EAJA sets a maximum billing rate for attorneys' fees, which are capped at $198 per hour for 2016 (i.e., $125 per hour, adjust for inflation from 1996 through 2016), this Court should exercise its inherent discretion, as well as its authority under 28 U.S.C. § 1927, to award Mike-sell's the full amount of its attorneys' fees because the NLRB acted in bad faith in filing its Petition. *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1145, 1148 (9th Cir. 2001) (citing 28 U.S.C. § 2412(d)(2)(A) and explaining calculation methodology for adjusting rates based on current consumer price index for urban consumers).

II. Mike-sell's is the Prevailing Party in this 10(j) Action.

Under the EAJA, "[a] litigant may attain prevailing party status if it obtains at least some relief on the merits of its position." *E.W. Grobbel Sons, Inc. v. NLRB*, 176 F.3d 875, 878 (6th Cir. 1999) (citing *Farrar v. Hobby*, 506 U.S. 103, 110 (1992)). Where an employer succeeds in defending against the issuance of a 10(j) injunction, the employer is a "prevailing party." *See, e.g.*, *NLRB v. Ridgewood Health Care Ctr., Inc*., No. 6:14-CV-2075-SLB, 2016 WL 2894105, *4 (N.D. Ala. May 18, 2016) (employer was prevailing party where 10(j) injunction not "just and proper"); *Overstreet v. Farm Fresh Co. Target One, LLC*, No. CV-13-02358-PHX-NVW, 2014 WL 4371427, *3 (D. Ariz. Sept. 4, 2014) (employer was prevailing party where it "defeats an attempt to materially alter the legal relationship"); *Cont'l Linen*, 2011 WL 2261537, *1-2 (employer "prevailed" where court refused to issue 10(j) injunction for bargaining). Here, Mike-sell's successfully opposed the Petition. (ECF 18.) That is, the Company obtained relief on the merits of its position that a 10(j) injunction was not just and proper, thereby preventing the NLRB from altering the legal relationship of the parties. (ECF 18.) Accordingly, Mike-sell's is the prevailing party in this action.

III. Petitioner's Request for Relief Was Not Substantially Justified.

For its Petition to succeed, the NLRB was required to prove that (1) "reasonable cause" exists to believe unfair labor practices occurred; and (2) an interim injunction would be "just and proper." *NLRB v. Voith Indus. Servs., Inc.*, 551 Fed. Appx. 825, 827 (6th Cir. 2014); *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 212 (6th Cir. 1995). It is well established that the NLRB should only seek injunctive relief in cases of extraordinary circumstances, "exercising its power, 'not as a broad sword, but as a scalpel, ever mindful of the dangers of conducting labor relations by way of injunction.'" *McLeod v. General Electric Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966). Injunctive relief is only appropriate if (and to the extent) reinstatement of the *status quo* is "reasonably necessary to preserve the ultimate remedial power of the Board," and only if (and to the extent) it would not create an undue hardship for the employer, the employees, or innocent third parties. *Voith*, 551 Fed. Appx. at 833 (internal citations and quotations omitted); *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 280 (6th Cir. 1998).

In *Ridgewood Health Care Center*, the employer filed an EAJA motion after the NLRB's 10(j) petition was denied. 2016 WL 2894105, *4. The employer argued an award of attorneys' fees, costs, and expenses was warranted because the petition was not substantially justified. *Id.* The court found the NLRB relied only on generalized arguments that the requested relief was "just and proper," whereas the evidence failed to support its position and, at times, contradicted it. *Id.* In granting the EAJA award, the *Ridgewood* court observed that "Section 10(j) is itself an extraordinary remedy to be used by the Board only when . . . an employer or union has committed such egregious unfair labor practices that any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated." *Id.* at *3 (citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192 (5th Cir. 1975)) (emphasis in original). Indeed, "the mere occurrence of unfair labor practices does not prove those . . . practices are 'egregious' or 'extraordinary,' deserving of immediate remedial relief." *Id.* (quoting *Pilot Freight Carriers*, 515 F.2d at 1192); *see also NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992) ("essential principle" that 10(j) relief "is an extraordinary remedy, to be requested . . . and granted . . . only under very limited circumstances. . . . is what dams the potential flood of § 10(j) injunction petitions"). Because the NLRB "did not present evidence of

egregious or extraordinary unfair labor practices," and relied only on generalized arguments, the EAJA motion was granted. *Ridgewood*, 2016 WL 2894105, *4.

Similarly, in *Dunbar v. MSK Corporation*, 84 Fed. Appx. 115, 116 (2d Cir. 2003), the court upheld an EAJA award where the employer cooperated fully during the NLRB's investigation, and the NLRB failed to fully vet the evidence before filing its 10(j) petition. The NLRB had communicated with the employer about whether it was required to bargain with a predecessor's union. *Id.* The NLRB was aware of the employer's good faith belief that most employees opposed union representation, as the employer explained its position and underlying reasoning on several occasions. *Id.* Despite the employer's exculpatory evidence and detailed position statements, the NLRB investigated no further before filing its petition. *Id.* In upholding the EAJA award, the court noted, "This is not a case where a putative violating employer, after being given a reasonable time to respond to the Board's requests for evidence concerning the employer's defenses, failed substantially to do so." *Id.* (citing *Lion Uniform v. NLRB*, 905 F.2d 120, 125 (6th Cir.1990); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1147–48 (D.C.Cir.1988)). Instead, the employer provided the NLRB with a position statement supported by responsive evidence, and the NLRB failed to conduct a thorough investigation. *Id.* Accordingly, the NLRB's 10(j) petition was not substantially justified and an award to the employer under the EAJA was warranted. *Id.*

Attorneys' fees, costs, and expenses are likewise warranted here. As in *Ridgewood*, neither the underlying facts nor the relevant law supports the Petition's grossly overbroad and unduly burdensome request for relief. Mike-sell's had been selling routes to distributors for over a decade—before, during, and after the term of the Expired Contract. (ECF 17, pp. 73-74.) The Court found that "Mike-sell's provided advance notice to the Union of its proposed route sales and consistently offered to bargain . . . regarding the effects of those sales," so "[t]his is not a case . . . where the employer flouted its obligations under the Act." (ECF 18, p. 19.) To the contrary, the Court recognized that the Company's position "has substantial support in the caselaw, regardless of what the Board ultimately decides." (ECF 18, p. 19.) Moreover, as this Court acknowledged, "all but two of the employees affected by the sales are still working for Mike-sell's as drivers. No drivers were laid off. The two drivers who left the Company did so by choice—one because he did not like the traffic on his new route, and the other because he found a 'better job.' Thus, the vast majority of the employees whose

rights are at issue are still at the Company and in a position to bargain regarding the sale of the routes—should the Board afford them that opportunity." (ECF, p. 16.) These facts fall short of the egregious and extraordinary circumstances needed to justify 10(j) relief.

Also, as in *Dunbar*, Mike-sell's presented exculpatory evidence to the NLRB during its investigation. On November 4, 2016, Mike-sell's submitted a factually-detailed and well-reasoned position statement in response to the Union's Charge. (Exhibit A – Shive Affidavit, ¶ 3 and Att. 1.) It explained that "the Company's decision to sell certain sales territory to independent distributors in order to effect a change in distribution methods was fully consistent with the parties' past practice, the Expired Contract, the Revised Final Offer, and the Paolucci Award." (Exhibit A – Shive Affidavit, ¶ 3 and Att. 1, p. 5 (emphasis in original).) It further advised that the sale of Routes 102, 104, 122, and 131 coincided with drivers' resignations/retirements and did not result in layoffs. (Exhibit A – Shive Affidavit, ¶ 3 and Att. 1, p. 3 at fn.10.) Thereafter, at the NLRB's specific request, Mike-sell's prepared and submitted a profitability analysis for the four routes in question, which reflected that three of the routes were losing thousands of dollars and one of them was profitable by only $61. (Exhibit A – Shive Affidavit, ¶ 4 and Att. 2.) Finally, Mike-sell's provided the NLRB with copies of the Bills of Sale for the territories and trucks liquidated in each transaction, as well as copies of the Distributor Agreements governing the routes at issue. (Exhibit A – Shive Affidavit, ¶¶ 5-6 and Atts. 3-4.)

On March 13, 2017, the Company sent a second position statement to the NLRB, explaining why Petitioner had no justification to seek 10(j) relief. (Exhibit A – Shive Affidavit, ¶ 7 and Att. 5.) This position statement informed the NLRB that Mike-sell's made no discriminatory remarks or plans to rid its business of Union workers.[14] (Exhibit A – Shive Affidavit, ¶ 7 and Att. 5, p. 3.) The Company also cited the Paolucci Award, which upheld the Company's inherent right to sell distribution routes. (Exhibit A – Shive Affidavit, ¶ 7 and Att. 5, p. 3.) Mike-sell's argued that a 10(j) injunction would not be just and proper because forcing the Company to rescind its contracts would cause undue financial hardship, would not restore the *status quo*, and was not necessary to preserve the NLRB's remedial power. (Exhibit A – Shive Affidavit, ¶ 7 and Att. 5, p. 3.)

[14] By letter dated March 13, 2017, the NLRB confirmed it had "approved the withdrawal of the 8(a)(3) allegation of the Charge" and "agreeing that there was insufficient evidence that the sale of the routes was discriminatorily motivated." (Exhibit A – Shive Affidavit, ¶ 8 and Att. 6.)

As in *Dunbar*, Mike-sell's clearly possessed a good faith belief that its decision to sell routes was well within its rights, as demonstrated by both past practice and the Paolucci Award. *See* 84 Fed. Appx. at 116. The NLRB was aware of Mike-sell's good faith belief because the Company had clearly apprised Petitioner of its position. (Exhibit A – Shive Affidavit, ¶¶ 3, 7 and Atts. 1, 5.) And, as in *Dunbar*, Mike-sell's cooperated fully in the NLRB's investigation and produced a plethora of exculpatory evidence. Nevertheless, less than a month after the Company's second position statement was submitted, the NLRB filed its Petition, wholly neglecting to conduct any additional investigation. (ECF 1.)

The fact that the NLRB failed to further investigate prior to filing its Petition was abundantly clear during the 10(j) hearing. As in *Ridgewood*, Petitioner presented no evidence that injunctive relief was necessary to preserve the NLRB's remedial power, and instead presented evidence that contradicted his position. *See* 2016 WL 2894105, *4. While the NLRB's brief baldly asserted that "some employees have already resigned employment because they believe respondent will continue to unilaterally eliminate bargaining unit jobs" (ECF 1, at p. 13), the NLRB elicited contrary testimony during the 10(j) hearing. (ECF 17, pp. 25-26, 33-34, 52-53, 60, 73-74.) Furthermore, as in *Ridgewood*, Petitioner relied on generalized arguments about "employee frustration" with the Union and the Board—a frustration that turned out to be entirely unrelated to the sale of routes. (ECF 17, pp. 21-24, 33-34, 36, 38, 51-60, 68-74, 76-82, 84-95.) Rather, "issues unrelated to the underlying grievance in this case" were "primarily responsible" for the deterioration of the relationship between the drivers and their Union. (ECF 18, p. 18.) Certainly, if this Court can make that determination after just one day of testimony, the NLRB—which was obligated to thoroughly investigate—should have made that same determination prior to filing its Petition.

Where courts have declined to award attorneys' fees to a prevailing party who successfully opposes a 10(j) injunction, the NLRB has presented at least some evidence to support its position that an injunction was just and proper. *See, e.g.*, *Contl. Linen*, 2011 WL 2261537, *3 (declining to award attorneys' fees to prevailing party because NLRB submitted evidence that limited injunctive relief was just and proper); *Hirsch v. Corban Corp., Inc.*, 968 F. Supp. 239, 241, n.2 (E.D. Pa. 1997) (NLRB presented evidence injunctive relief was just and proper, including that employees were afraid of assuming leadership roles following alleged unlawful discharge). And while the NLRB's position need not be correct to be "substantially justified," the NLRB must

demonstrate a reasonable basis in both law and fact to support its position. *Id.* at 241. (declining to award fees where because NLRB's theory was "clearly substantial").

Here, attorneys' fees are entirely appropriate because the NLRB presented no evidence whatsoever — much less "substantial justification"—to support its position that injunctive relief was just and proper. *See, e.g., Hess Mech. Corp. v. NLRB,* 112 F.3d 146, 149 (4th Cir. 1997) (awarding attorneys' fees where undisputed evidence contradicted NLRB's position that injunctive relief was warranted). Moreover, this Court acknowledged, "substantial caselaw" supported the Company's position that it was not required to bargain over the sale of routes. (ECF 18, at p. 19.)

Substantial caselaw also warned against filing the Petition in this case. Indeed, petitions for 10(j) injunctions have been denied where employers were accused of much more egregious conduct than that before this Court, and where the need for an injunction was far more dire. For example, in *Frye v. Pony Express Courier Corp.*, C2-94-363, 1994 WL 758335, *1 (S.D. Ohio July 7, 1994), this Court declined to issue a 10(j) injunction even after 20 different union locals filed unfair labor practice charges alleging the employer engaged in bad faith bargaining. In that case, administrative proceedings were estimated to take five months to complete, and the NLRB was concerned the delay would "cause erosion of the Union's support." *Id.* at *4. Similarly, in *Voith, Inc.*, 551 Fed. Appx. 825, 827, the Sixth Circuit upheld the denial injunctive relief, even after the ALJ found evidence of anti-union animus. In *Voith*, the Sixth Circuit also found evidence of coercion, unlawful assistance, and discriminatory refusal to hire. *Id.* at 833. Nonetheless, the court declined to issue the injunction because it would not be just and proper, finding no reason to believe the denial of interim relief would cause union support to erode. *Id.* at 836.

Here, the circumstances underlying the instant Complaint are plainly less concerning than in *Pony Express* or *Voith*. In contrast to the 20 unfair labor practice charges filed in *Pony Express*, only one Charge is at issue in this case. In addition, the NLRB filed its Petition seven months after the Charge was filed, and just one month before the administrative hearing, which would last only a few days. Given that Mike-sell's had periodically sold routes for over a decade, it was unreasonable and disingenuous for the NLRB to suggest an immediate injunction was necessary—especially since Petitioner waited seven months to even seek such relief. Unlike the concrete evidence of anti-union animus, discrimination, and coercion at issue in *Voith*, the NLRB

in this case had already approved the withdrawal of the Union's 8(a)(3) allegation before its Petition was filed, acknowledging "there was insufficient evidence that the sale of the routes was discriminatorily motivated." (Exhibit A – Shive Affidavit, ¶ 8 and Att. 6.) The fact that 10(j) petitions were denied in *Pony Express* and *Voith*—cases involving facts far more extraordinary than those present here—demonstrates just how unreasonable it was for the NLRB to believe this Court would find 10(j) injunctive relief to be just and proper.

It is further clear the NLRB's requested relief would have caused extreme hardship for Mike-sell's, its bargaining unit employees, and its distributors. Not only would the injunction have interfered with (or required breach of) the contracts between Mike-sell's and its distributors, but it would have also required the reacquisition of expensive equipment necessary for servicing the routes, including trucks, hand-held scanners, and other tools and equipment already disposed of. (ECF 17, p. 152.) Plus, forcing Mike-sell's to rescind distributorships would have negatively affected the Company's efficiency and competitiveness, as well as public perceptions about its stability and continuity of service. (ECF 17, p. 153.) The requested injunction may also have left Mike-sell's unable to afford current liabilities, such as the major capital improvement that was made possible only by the sales of the routes. (ECF 17, p. 149-151, 154.) Last, the Petition's request for relief would jeopardize the livelihood of two distributors, who have made significant investments to become small business owners. (ECF 17, pp. 176-78.) Ironically, while no jobs were lost when the routes were sold, at least four jobs (belonging to employees of distributors) would have been lost if the Petition were granted. (ECF 17, pp. 176-77, 206-07.) Yet, if Mike-sell's brought the four routes back in-house, it would have no drivers to run them. (ECF 17, pp. 152-53.) Because the NLRB sought destructive, disproportionate relief that would cause great hardship to Mike-sell's, innocent third parties, and the public interest, the Petition was <u>not</u> substantially justified, and an award of attorneys' fees, costs, and expenses is warranted. *See, e.g.*, *Overstreet*, 2014 WL 4371427, *4 (granting attorneys' fees even where 10(j) relief was granted in part, where NLRB demanded reinstatement of employees without verifying their legal status); see also *Schaub*, 154 F.3d 276, 280 (no 10(j) relief where it would cause significant hardship to employer and replacement workers); *Frye v. Kentucky May Coal Co., Inc.*, CIV. A. 94-132, 1994 WL 739464, *4 (E.D. Ky. Dec. 21, 1994) (denying 10(j) relief where it would substantially burden employer and employees).

In denying the Petition, this Court correctly recognized that the NLRB "seeks an extremely broad injunction that would effectively provide all of the relief that it might obtain from the Board." (ECF 18, p. 15.) Certainly, Petitioner's request for what amounts to a ruling on the merits on the underlying Complaint was entirely without legal basis. Every time the NLRB seeks a 10(j) injunction, courts reiterate that interim relief may not serve as a ruling on the merits—even where relief is ultimately granted. *See, e.g.*, *NLRB v. DaNite Holdings, Ltd.*, 2:10-CV-605, 2010 WL 3001854, *2 (S.D. Ohio July 30, 2010) (courts are not to adjudicate merits of unfair labor practice cases); *Calatrello v. Carriage Inn of Cadiz*, 2:06-CV-697, 2006 WL 3230778, *3 (S.D. Ohio Nov. 6, 2006) (same); *Farkas v. Plumbers and Steamfitters Loc. Union No. 189*, C-2-80-588, 1980 WL 2019, *6 (S.D. Ohio Aug. 13, 1980) (same). And yet, that is exactly what the NLRB requested in this case, defying this Court's express directives and ignoring legal precedent.

In this case, the real motive for the Petition had nothing to do with preserving the Union's support or the NLRB's remedial power in relation to the four routes sold in 2016. The Petition was instead an indirect attempt at forcing the Company's hand in collective bargaining for a successor agreement. It is no secret that, for years, Mike-sell's has been embroiled in contentious litigation with the NLRB and the Union over contract negotiations, alleged impasses, unilaterally-implemented terms, and backpay calculations. (ECF 17, pp. 21-24, 33-34, 36, 38, 51-60, 68-74, 76-82, 84-95.) Petitioner has long insisted the Expired Contract should still be in effect today, and in support of its Petition, the NLRB repeatedly argued that drivers' current employment terms were "found to be unlawfully implemented" and that Mike-sell's "failed to rescind [these] unlawful, unilateral changes."[15] (ECF 1-1, pp. 3, 10, 14.) Mike-sell's disagrees with Petitioner and believes the Expired Contract was only in effect through June 12, 2013, after which the Company was privileged to lawfully implement its Revised Final Offer based on the parties' good faith bargaining impasse. But in any event, the NLRB's continuous references to Case No. 09-CA-094143 shed light on the true impetus for its Petition: the

[15] These assertions ignore the distinction between the Company's Final Offer (implemented in November 2012) and Revised Final Offer (implemented in June 2013), attempting to portray the lawfulness of the Revised Final Offer as a foregone conclusion. However, consistent with Sections 10616 and 10646.1 of the Board's Casehandling Manual for Compliance Proceedings ("Manual"), the NLRB has already recognized a "legitimate dispute" over the validity of the Revised Final Offer through the issuance of a Compliance Specification in Case No. 09-CA-094143, which expressly admits that "a controversy presently exists over whether the parties reached a good faith impasse about June 13, 2013." If the Company's reliance on the parties' June 2013 impasse was merely a "frivolous defense" to compliance with an enforced NLRB Order, then the NLRB presumably would have initiated contempt proceedings instead of compliance proceedings, as directed by Section 10616 of the Manual. It is therefore clear that the lawfulness of the unilaterally-implemented Revised Final Offer has yet to be determined, so any suggestions to the contrary are misleading and disingenuous, at best.

frustration of having to relitigate another alleged impasse in compliance proceedings in attempt to achieve the desired remedy of full backpay to the present date.

By filing a Petition broadly seeking to enjoin Mike-sell's from "[r]efusing to meet and bargain in good faith with the Union over any proposed changes" and "[r]efusing to provide the Union with information . . . requested . . . for it to fulfill [any] role as the collective bargaining representative," the Union would be free to threaten and the NLRB would be free to bring a contempt action against Mike-sell's for bargaining issues and information requests wholly unrelated to the sale of routes. (ECF 1, pp. 8-9 (emphasis added).) Similarly, by seeking broad affirmative relief in the way of forcing Mike-sell's, within five days, to "meet and bargain with the Union over any proposed changes" and to "bargain collectively with the Union . . . with respect to [any] conditions of employment," the NLRB reached far beyond that needed to cure the Complaint allegations and instead mandated regular contract negotiations—an activity for which the parties have not met since June 2014. (ECF 1, pp. 9-10; ECF 17, p. 108.) The NLRB was obviously expecting to gain leverage over Mike-sell's, achieving through a 10(j) injunction what the Union was unable to get after five years at the bargaining table: a new contract. The NLRB's attempt to obtain a grossly overbroad and unduly burdensome 10(j) injunction to circumvent the administrative process and meddle in the parties' overall bargaining relationship smacks of bad faith and proves the Petition was not substantially justified. In sum, upon examining the record, it is plain the NLRB possessed neither a factual basis nor a legal basis to believe its Petition was just and proper. Thus, an award to Mike-sell's is warranted under 28 U.S.C. §§ 1920, 1927, 2412, and the Court's inherent authority.

SPECIFIC AWARD SOUGHT

Pursuant to 28 U.S.C. § 1927 and/or the Court's inherent authority, Mike-sell's respectfully seeks an already-discounted award of reasonable attorneys' fees in the amount of $92,094.00, the actual cost of the defense of the bad-faith Petition. (Exhibit B – Asbrock Affidavit, ¶¶ 6-14 and Atts. 1-2.) Alternatively, if this Honorable Court is not inclined to award the actual attorneys' fees requested above, then Mike-sell's seeks attorneys' fees in the further reduced amount of $62,884.80 (i.e., $198 per hour for 317.60 hours billed by attorneys, and $160 per hour for 1.8 hours billed by a paralegal), which reflects the statutory maximum rate of $125 per hour under the Equal Access to Justice Act ("EAJA") with adjustments to account for increases in

the cost of living since March 1996. (Exhibit B – Asbrock Affidavit, ¶ 15 and Atts. 1, 3.) *See, e.g., Sorenson,* 239 F.3d at 1145, 1148.

Along with any award of attorneys' fees, Mike-sell's respectfully seeks to recover it litigation costs and expenses in the amount of $1,786.60. (Exhibit B – Asbrock Affidavit, ¶ 8 and Att. 1, pp. 10-11.) *See, e.g., Adkinson*, 256 F. Supp. 2d 1297, 1319 (telephone charges, travel time, meals, transcript fees, fax charges, postage, paralegal fees, law clerk wages, and computerized research expenses are compensable under the EAJA); *Poole*, 779 F. Supp. 1546, 1572-73 (photocopy charges, long distance telephone charges, travel expenses, postage/shipping charges, court filing fees, and air courier costs are compensable under the EAJA).

CONCLUSION

For the foregoing reasons, pursuant to 28 U.S.C. §§ 1920, 1927, 2412, and the Court's inherent authority, Mike-sell's respectfully moves for an award of reasonable attorneys' fees, costs, and expenses.

Respectfully submitted,

/s/ Jennifer R. Asbrock
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Counsel for Mike-sell's Potato Chip Co.

CERTIFICATE OF SERVICE

I hereby certify that Defendant-Respondent's Memorandum in Support of Motion for Attorneys' Fees, Costs, and Other Expenses was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following, with hard copies served as follows on this 26th day of June, 2017:

Garey E. Lindsay, Regional Director
Eric A. Taylor, Counsel for the Regional Director
Linda Finch, Counsel for the Regional Director
Naima Clark, Counsel for the Regional Director
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/s/ Jennifer R. Asbrock
Jennifer R. Asbrock
Counsel for Mike-sell's Potato Chip Co.

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	*ELECTRONICALLY FILED*
PLAINTIFF-PETITIONER,	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	
MIKE-SELL'S POTATO CHIP CO.,	**AFFIDAVIT OF CHARLES SHIVE IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	

The Affiant, Charles Shive, after first being duly sworn, hereby states and affirms the following:

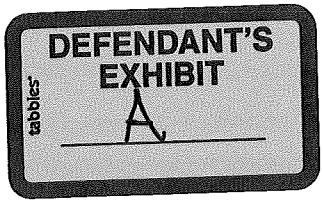
1. My name is Charles Shive. I am of lawful age, and I am competent to attest to the facts stated in this Affidavit, which are true, correct, and based on my own personal knowledge.

2. I am employed by Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's" or "Company"), a for-profit business incorporated in the State of Ohio. I have held the position of Chief Executive Officer since 2012.

3. Attachment 1 is a true and complete copy of the position statement (including exhibits) that Mike-sell's submitted to Plaintiff-Petitioner National Labor Relations Board ("NLRB") on November 4, 2016, in response to Unfair Labor Practice Charge No. 09-CA-184215 ("Charge") filed by the International Brotherhood of Teamsters, Local Union No. 957 under the National Labor Relations Act ("Act").

4. Attachment 2 is a true and complete copy of a profitability analysis for Routes 102, 104, 122, and 131, which was prepared and submitted to the NLRB at the agency's specific request in connection with its investigation of the Charge.

5. Attachment 3 is a true and complete copy of the Bills of Sale for the territories and trucks liquidated in the sale of Routes 102, 104, 122, and 131, which were submitted to the NLRB at the agency's specific request in connection with its investigation of the Charge.



6. Attachment 4 is a true and complete copy of the Distributor Agreements governing Routes 102, 104, 122, and 131, which were submitted to the NLRB at the agency's specific request in connection with its investigation of the Charge.

7. Attachment 5 is a true and complete copy of the position statement (including exhibits) that Mike-sell's submitted to the NLRB on March 13, 2017, in response to the agency's specific request for the Company's position on the propriety of seeking interim injunctive relief under Section 10(j) of the Act.

8. Attachment 6 is a true and complete copy of a letter from the NLRB dated March 13, 2017, confirming that the agency had "approved the withdrawal of the 8(a)(3) allegation of the Charge" and "agreeing that there was insufficient evidence that the sale of the routes was discriminatorily motivated."

9. I am familiar with the Company's financial records, including its assets, liabilities, and net worth. On the date the Petition was filed, the Company's net worth did not exceed $7,000,000. The Company's net worth is calculated in accordance with Generally Accepted Accounting Principles. (*See also* ECF 5-1, ¶ 27 and fn.1.)

10. On the date the Petition was filed, Mike-sell's employed fewer than 500 individuals.

AFFIANT FURTHER SAYETH NAUGHT.

Charles Shive, Chief Executive Officer
Mike-sell's Potato Chip Company

STATE OF OHIO)
COUNTY OF MONTGOMERY)

Subscribed and sworn to before me by Charles Shive on this 26th day of June, 2017.

Notary Public, State at Large Sharon E. Meeker
My Commission Expires: Sept. 20, 2020

EN11783.Public-11783 4810-7068-8331v1

Frost Brown Todd LLC
ATTORNEYS

Jennifer R. Asbrock
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November 4, 2016

Via Electronic Mail @ www.nlrb.gov

Jodi A. Suber, Field Examiner
National Labor Relations Board, Region 9
550 Main Street, Room 3003
Cincinnati, Ohio 45202-3271

Re: Mike-sell's Potato Chip Company
Charge No. 09-CA-184215

Dear Ms. Suber:

This represents the position statement of Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") in response to the above-referenced unfair labor practice charge filed by IBT Local Union No. 957 ("Union").[1] The charge asserts that Mike-sell's violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act ("NLRA") by declining to bargain with the Union over the decision to sell four delivery routes to independent distributors and by declining to produce certain information requested by the Union in connection with its request for decisional bargaining. Because the Company's actions are consistent with a prior arbitration award that is binding on the parties, the Union's charge is meritless and should be dismissed.

I. BACKGROUND FACTS

Mike-sell's is a privately-held manufacturer and distributor of snack foods headquartered in Dayton, Ohio. Mike-sell's manufactures and packages snack products at its Dayton plant and then distributes them to retailers in Ohio, Indiana, and Kentucky through the help of route sales drivers and independent distributors. Route sales drivers are responsible for loading their Company trucks, traveling to customer locations, stocking customer shelves, performing point-of-sale marketing, building route sales, rotating unsold product, and removing unsold goods that have exceeded their shelf life. In contrast, independent distributors are independently-owned businesses that actually take on the risk of loss by choosing the specific type and amount of products to be marketed, purchasing those products outright, and promoting, delivering, and re-selling the products in order to earn their costs back. When Mike-sell's uses

[1] Mike-sell's submits this position statement in an effort to achieve informal administrative resolution of this unfair labor practice charge. In submitting this position statement, the Company does not intend to waive any defenses it may have or in any way prejudice itself with respect to any procedural or substantive issue.

ATTACHMENT
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RTE. 102 52 Wks 2015		RTE. 104 52 Wks 2015		RTE. 122 52 Wks 2015		RTE. 131 52 Wks 2015	
	Rte 102		Rte 104		Rte 122		Rte 131
GROSS CHIP SALES	$185,414	GROSS CHIP SALES	$305,659	GROSS CHIP SALES	$236,425	GROSS CHIP SALES	$181,443
GROSS CORN SALES	$46,280	GROSS CORN SALES	$41,414	GROSS CORN SALES	$33,709	GROSS CORN SALES	$46,090
GROSS PRETZEL	$18,216	GROSS PRETZEL	$30,163	GROSS PRETZEL	$22,486	GROSS PRETZEL	$14,103
GROSS ALLIED	$19,583	GROSS ALLIED	$22,765	GROSS ALLIED	$32,743	GROSS ALLIED	$44,183
TOTAL GROSS SALES	$269,503	TOTAL GROSS SALES	$401,001	TOTAL GROSS SALES	$325,363	TOTAL GROSS SALES	$283,819
PROMOTION EXPENSE	$28,817	PROMOTION EXPENSE	$45,196	PROMOTION EXPENSE	$26,378	PROMOTION EXPENSE	$21,641
NET SALES	$240,691	NET SALES	$355,805	NET SALES	$298,985	NET SALES	$262,178
CHIP C.O.G.	$79,914	*CHIP C.O.G.*	$132,170	*CHIP C.O.G.*	$101,899	*CHIP C.O.G.*	$78,202
CORN C.O.G.	$14,859	*CORN C.O.G.*	$13,294	*CORN C.O.G.*	$10,821	*CORN C.O.G.*	$14,153
PRETZELS C.O.G.	$9,126	*PRETZELS C.O.G.*	$15,112	*PRETZELS C.O.G.*	$11,266	*PRETZELS C.O.G.*	$7,066
ALLIED C.O.G.	$11,459	*ALLIED C.O.G.*	$13,317	*ALLIED C.O.G.*	$19,155	*ALLIED C.O.G.*	$25,847
TOTAL C.O.G.	$115,358	*TOTAL C.O.G.*	$173,893	*TOTAL C.O.G.*	$143,140	*TOTAL C.O.G.*	$125,267
GROSS MARGIN	$125,333	GROSS MARGIN	$181,912	GROSS MARGIN	$155,845	GROSS MARGIN	$136,910
LOGISTICS - WAREHOUSE	$4,531	LOGISTICS - WAREHOUSE	$4,531	LOGISTICS - WAREHOUSE	$4,531	LOGISTICS - WAREHOUSE	$4,531
LOGISTICS - TRANSPORTATION	$419	LOGISTICS - TRANSPORTATION	$419	LOGISTICS - TRANSPORTATION	$419	LOGISTICS - TRANSPORTATION	$419
TOTAL LOGISTICS EXPENSE	$4,949	TOTAL LOGISTICS EXPENSE	$4,949	TOTAL LOGISTICS EXPENSE	$4,949	TOTAL LOGISTICS EXPENSE	$4,949
EXPENSES		EXPENSES		EXPENSES		EXPENSES	
MARKETING	$7,087	MARKETING	$7,087	MARKETING	$7,087	MARKETING	$7,087
SALES OPERATIONS	$131,787	SALES OPERATIONS	$146,535	SALES OPERATIONS	$138,083	SALES OPERATIONS	$133,647
ADMINISTRATION & OFFICE	$23,279	ADMINISTRATION & OFFICE	$23,279	ADMINISTRATION & OFFICE	$23,279	ADMINISTRATION & OFFICE	$23,279
TOTAL EXPENSES	$162,154	TOTAL EXPENSES	$176,902	TOTAL EXPENSES	$168,450	TOTAL EXPENSES	$164,014
NET INCOME FROM OPERATIONS	-$41,769	NET INCOME FROM OPERATIONS	$61	NET INCOME FROM OPERATIONS	-$17,554	NET INCOME FROM OPERATIONS	-$32,052

ATTACHMENT 2

RTE. 102 35 Wks 2016		RTE. 104 35 Wks 2016		RTE. 122 35 Wks 2016		RTE. 131 35 Wks 2016	
	Rte 102		Rte 104		Rte 122		Rte 131
GROSS CHIP SALES	$96,894	GROSS CHIP SALES	$200,186	GROSS CHIP SALES	$145,661	GROSS CHIP SALES	$116,139
GROSS CORN SALES	$27,106	GROSS CORN SALES	$30,752	GROSS CORN SALES	$24,191	GROSS CORN SALES	$31,423
GROSS PRETZEL	$10,920	GROSS PRETZEL	$23,255	GROSS PRETZEL	$15,819	GROSS PRETZEL	$9,389
GROSS ALLIED	$9,167	GROSS ALLIED	$8,650	GROSS ALLIED	$11,905	GROSS ALLIED	$25,121
TOTAL GROSS SALES	$144,088	TOTAL GROSS SALES	$262,853	TOTAL GROSS SALES	$197,573	TOTAL GROSS SALES	$182,072
PROMOTION EXPENSE	$12,876	PROMOTION EXPENSE	$27,138	PROMOTION EXPENSE	$13,393	PROMOTION EXPENSE	$10,952
NET SALES	$131,212	NET SALES	$235,715	NET SALES	$184,180	NET SALES	$171,120
CHIP C.O.G.	$45,345	*CHIP C.O.G.*	$93,692	*CHIP C.O.G.*	$68,170	*CHIP C.O.G.*	$54,353
CORN C.O.G.	$8,674	*CORN C.O.G.*	$9,841	*CORN C.O.G.*	$7,741	*CORN C.O.G.*	$10,055
PRETZELS C.O.G.	$5,384	*PRETZELS C.O.G.*	$11,465	*PRETZELS C.O.G.*	$7,797	*PRETZELS C.O.G.*	$4,629
ALLIED C.O.G.	$5,152	*ALLIED C.O.G.*	$4,861	*ALLIED C.O.G.*	$6,691	*ALLIED C.O.G.*	$14,118
TOTAL C.O.G.	$64,556	*TOTAL C.O.G.*	$119,858	*TOTAL C.O.G.*	$90,398	*TOTAL C.O.G.*	$83,155
GROSS MARGIN	$66,656	GROSS MARGIN	$115,857	GROSS MARGIN	$93,781	GROSS MARGIN	$87,965
LOGISTICS - WAREHOUSE	$3,987	LOGISTICS - WAREHOUSE	$3,987	LOGISTICS - WAREHOUSE	$3,987	LOGISTICS - WAREHOUSE	$3,987
LOGISTICS - TRANSPORTATION	$12	LOGISTICS - TRANSPORTATION	$12	LOGISTICS - TRANSPORTATION	$12	LOGISTICS - TRANSPORTATION	$12
TOTAL LOGISTICS EXPENSE	$3,999	TOTAL LOGISTICS EXPENSE	$3,999	TOTAL LOGISTICS EXPENSE	$3,999	TOTAL LOGISTICS EXPENSE	$3,999
EXPENSES		EXPENSES		EXPENSES		EXPENSES	
MARKETING	$4,771	MARKETING	$4,771	MARKETING	$4,771	MARKETING	$4,771
SALES OPERATIONS	$86,470	SALES OPERATIONS	$100,681	SALES OPERATIONS	$93,565	SALES OPERATIONS	$91,513
ADMINISTRATION & OFFICE	$17,463	ADMINISTRATION & OFFICE	$17,463	ADMINISTRATION & OFFICE	$17,463	ADMINISTRATION & OFFICE	$17,463
TOTAL EXPENSES	$108,704	TOTAL EXPENSES	$122,915	TOTAL EXPENSES	$115,819	TOTAL EXPENSES	$113,747
NET INCOME FROM OPERATIONS	-$45,047	NET INCOME FROM OPERATIONS	-$11,057	NET INCOME FROM OPERATIONS	-$26,035	NET INCOME FROM OPERATIONS	-$29,781

VEHICLE
BILL OF SALE

THIS BILL OF SALE executed as of this day 9/2/2016, by Lisa Ann Krupp d.b.a. BLM Distributing ("Buyer") and Mike-sell's Potato Chip Co. an Ohio Corporation ("Seller").

In consideration of the sum of [redacted], Seller hereby sells, transfers, conveys, assigns and delivers to Buyer, and Buyer hereby purchases and excepts with no past, present or future claim, or fee payable, or any charge what so ever; and assumes and receives from Seller, all of Seller's right, title and interest in and to the vehicle more particularly described below:

	Mileage	Price
2010 FORD 18' GRUMMAN 1FC2E3KL5ADA44057	71,498	[redacted]

Seller covenants that Seller is lawfully possessed of the Vehicles and has good right to convey the same and that the Vehicle is free and clear of all liens and encumbrances, and Seller, and Seller's successors and assigns, as the case may be, will warrant and defend the title of the Buyer in and to the vehicle against the claims and demands of all persons whomsoever. Seller agrees to execute any and all other documents necessary to effectuate the transfer and conveyance of the vehicle from Seller to Buyer.

Seller conveys the vehicle to buyer "AS IS" and "WITH ALL FAULTS."

This Bill of Sale shall be effective as to the transfer of the vehicle herein described as of the 4th, Day of September, 2016.

BY: _____
SELLER: C.F.O. Paul D. McNiel
Mike-sell's Potato Chip Company

BY: _____
BUYER: Lisa Ann Krupp
d.b.a. BLM Distributing
Mike-sell's Distributor

ATTACHMENT
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VEHICLE BILL OF SALE

THIS BILL OF SALE executed as of this day 9/11/2016, by Charles T. Morris d.b.a. The Big TMT Enterprize LLC.") and Mike-sell's Potato Chip Co. an Ohio Corporation ("Seller").

In consideration of the sum of [redacted] Seller hereby sells, transfers, conveys, assigns and delivers to Buyer, and Buyer hereby purchases and excepts with no past, present or future claim, or fee payable, or any charge what so ever; and assumes and receives from Seller, all of Seller's right, title and interest in and to the two vehicles more particularly described below:

	Mileage	Price
2007 FORD 18' UTILIMASTER 1FCJE39LX7DA78714		[redacted]

Seller covenants that Seller is lawfully possessed of the Vehicles and has good right to convey the same and that the Vehicle is free and clear of all liens and encumbrances, and Seller, and Seller's successors and assigns, as the case may be, will warrant and defend the title of the Buyer in and to the vehicle against the claims and demands of all persons whomsoever. Seller agrees to execute any and all other documents necessary to effectuate the transfer and conveyance of the vehicle from Seller to Buyer.

Seller conveys the vehicle to buyer "AS IS" and "WITH ALL FAULTS."

IN WITNESS WHEREOF, Seller and Buyer have caused this Bill of Sale to be duly and properly executed, as of this day and year first above written.

BY:
SELLER: Charles S. Shive Jr. C.E.O.
Mike-sell's Potato Chip Company

BY:
BUYER: Charles T. Morris
d.b.a. The Big TMT Enterprize LLC.
Mike-sell's Distributor

VEHICLE BILL OF SALE

THIS BILL OF SALE executed as of this day 9/28/2016, by Rebecca J. Whiteside d.b.a. BTO Distribution ("Buyer") and Mike-sell's Potato Chip Co. an Ohio Corporation ("Seller").

In consideration of the sum of [redacted] Seller hereby sells, transfers, conveys, assigns and delivers to Buyer, and Buyer hereby purchases and excepts with no past, present or future claim, or fee payable, or any charge what so ever; and assumes and receives from Seller, all of Seller's right, title and interest in and to the vehicle more particularly described below:

	Mileage	Price
2007 FORD Utillmaster Body 1FCJE39L77DA78718	$ 1,000.00	[redacted]

Seller covenants that Seller is lawfully possessed of the Vehicles and has good right to convey the same and that the Vehicle is free and clear of all liens and encumbrances, and Seller, and Seller's successors and assigns, as the case may be, will warrant and defend the title of the Buyer in and to the vehicle against the claims and demands of all persons whomsoever. Seller agrees to execute any and all other documents necessary to effectuate the transfer and conveyance of the vehicle from Seller to Buyer.

Seller conveys the vehicle to buyer "AS IS" and "WITH ALL FAULTS."

This Bill of Sale shall be effective as to the transfer of the vehicle herein described as of the 28th, Day of September, 2016.

BY: _____
SELLER: C.F.O. Paul D. McNiel
Mike-sell's Potato Chip Company

BY: _____
BUYER: Rebecca J. Whiteside
d.b.a. BTO Distribution LLC.
Mike-sell's Distributor

VEHICLE BILL OF SALE

THIS BILL OF SALE executed as of this day 10/19/2016, by Jeff Welch ("Buyer") and Mike-sell's Potato Chip Co. an Ohio Corporation ("Seller").

In consideration of the sum of [redacted] Seller hereby sells, transfers, conveys, assigns and delivers to Buyer, and Buyer hereby purchases and excepts with no past, present or future claim, or fee payable, or any charge what so ever; and assumes and receives from Seller, all of Seller's right, title and interest in and to the two vehicles more particularly described below:

	Mileage	Price
2007 FORD 18' UTILIMASTER 1FCJE39L37DA78716	118,816	[redacted]

Seller covenants that Seller is lawfully possessed of the Vehicles and has good right to convey the same and that the Vehicle is free and clear of all liens and encumbrances, and Seller, and Seller's successors and assigns, as the case may be, will warrant and defend the title of the Buyer in and to the vehicle against the claims and demands of all persons whomsoever. Seller agrees to execute any and all other documents necessary to effectuate the transfer and conveyance of the vehicle from Seller to Buyer.

Seller conveys the vehicle to buyer "AS IS" and "WITH ALL FAULTS."

IN WITNESS WHEREOF, Seller and Buyer have caused this Bill of Sale to be duly and properly executed, as of this day and year first above written.

BY: _____
SELLER: Paul D. McNiel C.F.O.
Mike-sell's Potato Chip Company

BY: _____
BUYER: Jeff Welch

INDEPENDENT DISTRIBUTOR AGREEMENT

THIS INDEPENDENT DISTRIBUTOR AGREEMENT (this *"Agreement"*) is entered into this 15th day of December, 2015, by and between Mike-sell's Potato Chip Company, herein called the *"Company"*, and, Charles Thomas Morris d.b.a. The Big TMT Enterprize LLC., as distributor, herein called the *"Distributor"*.

WITNESSETH

WHEREAS, as a result of, among other things, the Company's program of research and product development and extensive advertisement of the Products in advertising media, there has been created certain goodwill and a continuing demand for the Products.

WHEREAS, the Distributor is an individual proprietor or entity with adequate capital, either engaged, or desiring to become engaged, in the business of buying and selling snack food products to food stores, restaurants, places of amusement, and other retail outlets in areas where the Products have heretofore been, or will be advertised and sold.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Distributor do hereby agree as follows:

1) The Company grants to the Distributor the nonexclusive right, subject to the terms and conditions set forth herein, to buy, sell, and distribute the Products at wholesale in the Territory (as may be modified from time to time) described on Exhibit A attached hereto. The Distributor accepts this right and agrees to exercise primary responsibility for the wholesale distribution of the Products within the boundaries of the Territory, and, in connection therewith, to use its best efforts to sell, promote the sale of, and distribute the Products to retailers located within the Territory. The Distributor agrees that it will buy the Products only from the Company or such other persons as the Company shall from time to time identify and will sell and solicit sales of the Products only in the Territory. The Distributor understands that the Company may elect to sell to institutional suppliers, vending companies, and/or select company accounts as identified by the Company on a direct shipment basis with no compensation due the Distributor. If there should become a dispute as to territory boundaries between distributorships, after investigation and interpretation by the Company, the final decision may be made by the Company, without recourse from the distributors involved, as to which distributor is to service the territory in question.

2) The Company agrees to sell and deliver to the Distributor, in the quantities required for the Distributor's wholesale business, the Products that are being made available by the Company to other independent distributors authorized to wholesale the Company's snack food products in the Company's same sales region, or which may hereafter be made available by the Company to such distributors as this line of Products is changed from time to time and the Distributor is expected to sell the product line available. However, the Company shall not be liable for delays in delivery due to failures in manufacturing, product shortages, strikes, transportation shortages, or causes beyond the control of the Company, such as acts of terror, war, riots, fire, Acts of God and other events or circumstances beyond the control of the Company whether similar or dissimilar to the foregoing. The Distributor agrees to make payments for the Products as follows:

a) The Distributor will pay the Company, as the purchase price for each type of Product delivered, the Company's then current suggested wholesale price as determined by the Company in its sole discretion from time to time, herein called the *"store-to-door price"*, less a Distributor margin of (i) [redacted] percent ([redacted]%), in the case of Mike-sell's manufactured products; (ii) [redacted] percent ([redacted]%), in the case of "Mike-sell's" allied products, and; (iii) [redacted] percent ([redacted]%) in the case of partner brands, i.e. On the Border, etc. and Private Label products will be at (iv) [redacted] percent ([redacted]%), each, a *"Distributor Margin"*. The Distributor understands and agrees that the Company may in its sole discretion, at least once annually, adjust upward or downward any Distributor Margins; provided, however, that the Company must provide the Distributor written notice at least thirty (30) days prior to any such Distributor Margin change taking effect.

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b) The Distributor will be issued a credit by the Company for Products returned to the Company that were defective or damaged when received, or salable Products that were shipped to the Distributor as a result of an error by the Company; provided, however, that to receive any such credit the Distributor must either refuse to accept such Products or, if it has received any such Products, it must notify the Company thereof within two (2) days of having received such Products.

c) Returnable and reusable cartons containing Products manufactured by the Company will be charged to the Distributor, and upon the timely return of such cartons the Distributor will be credited. In addition, if the Distributor fails to return in any six (6) month period ending on June 30 and December 31 in excess of [redacted] percent ([redacted]%) of the returnable and reusable cartons it received during such sixth-month period, then the Distributor shall be charged the replacement cost per carton for all returnable and reusable cartons that were not returned by it to the Company during such period.

d) The net amount of the invoice for each shipment of Product received by the Distributor shall be remitted by Automated Clearing House or ACH debits or credits, as provided in subparagraph (f) of this Paragraph 2, by the Distributor promptly upon receipt of such invoice. The Company will accept, in lieu of cash, as payment for any amounts owed to it by the Distributor for purchases of Products, invoices properly stamped and signed by authorized representative(s) of Distributor's charge-account customers whose credit the Company has prior thereto investigated and found to be acceptable, provided such invoices are submitted to the Company no later than three (3) days after the delivery of the Products to the customer. By delivery of such properly stamped and signed charge-account invoices to the Company, the Distributor warrants the genuineness of the same as evidence of an open account indebtedness owed by the customer for Products purchased from the Distributor. By accepting such charge-account invoices from the Distributor, the Company acknowledges receipt from the Distributor of the net amount provided in such charge-account invoices as owed by the customer; and, if these amounts are in fact owed, the Company will have no recourse against the Distributor by reason of the failure of the customer to pay such invoices. These authorized charge-account invoices, also sometimes referred to as "Factored Invoices", will be credited to the Distributor.

e) THE DISTRIBUTOR AGREES TO FULLY AND CONSISTENTLY ADHERE TO THE DELIVERY AND MERCHANDISE STANDARDS PRESCRIBED BY ITS CUSTOMERS AND BY THE COMPANY FROM TIME TO TIME AND TO T-COM ALL CHARGE/FACTORED INVOICES TO THE COMPANY, WITHOUT EXCEPTION BY 9:00P.M. OF EACH BUSINESS DAY AND BY 9:00P.M. EACH SATURDAY. (Please note that the required Saturday T-Com allows the Company to download to the Distributor's handheld route accounting computer customer Product pricing for the following week and to bill certain chain accounts on a timely basis for weekly charges.) In addition, the Distributor shall promptly submit to the Company properly stamped and signed by authorized representative(s) of Distributor's customers copies of delivery invoices required for chain accounts requiring centralized billing. If the Distributor fails to submit those invoices for any given week by Thursday of the following week, the Company may charge and debit the Distributor's account a minimum of [redacted] ($[redacted]) per week until such invoices are submitted by the Distributor. (Please note that such failure by the Distributor to timely submit invoices results in the Company having to delay billing customer accounts.)

f) The Distributor agrees to execute an authorization agreement for automatic ACH debits or credits by the Company (any such account so established, an *"ACH Account"*), whereby the Company shall have, among other things, the authority to debit or credit, as the case may be, Distributor's ACH Account each Thursday for the prior week's ending balance. If the Company is unable to withdraw the full balance of amounts owed by the Distributor from the Distributor's ACH Account because such account has insufficient funds, the Company may charge and debit the Distributor's ACH Account a minimum of [redacted] ($[redacted]) and interest equal to the lesser of the daily equivalent of [redacted] percent ([redacted]%) per annum of such unpaid amounts per year, or the highest rate then permitted by applicable law, for each day such unpaid amounts are past due.

g) The Distributor understands that the Company may change its computer system from time to time and agrees that the provisions of subparagraphs (e) and (f) of this Paragraph 2 may be modified by the Company to reflect changes necessitated by any new computer system.

3) The Distributor shall have the right to sell the Products purchased from the Company at such prices as it negotiates with its customers; however, it is understood that the Company negotiates the sales price of Products to certain chain stores and that, as a result, the Distributor cannot negotiate higher sales prices with the particular outlets of that chain store in the Territory. If the Distributor chooses to sell to such chain store outlets in the Territory, the Distributor must sell the Products to such chain store outlets at prices not greater than those specified by the Company. If the Distributor chooses not to sell to the outlets of the chain store in the Territory, the Distributor agrees to notify the Company of that fact in advance and agrees to allow the Company to have another distributor or representative of the Company sell to such chain store outlets. Further, from time to time, the Company may establish other maximum pricing for certain Products, for certain customers and/or certain situations; the Distributor shall adhere to such maximum pricing as so established by the Company, provided that the Distributor shall not be required to sell the Products at any particular price at or above a minimum price if such requirement would be unlawful. In all cases, applicable federal and state statutes pertaining to price discrimination shall be obeyed.

4) The Distributor agrees to maintain sufficient inventory of the Products to meet the needs of retailers in the Territory. The Distributor shall be responsible for protecting the Products as deemed appropriate, after they have been delivered, against theft, fire, and other loss or damage; and the Company shall have no liability in this respect, unless the loss or Damage is caused by negligence attributable to the Company. The Company will supply the Products to the Distributor's warehouse. When a Distributor does not have enough sales volume to purchase or receive full loads (approximately 1,000 cases), the Distributor will be required to share warehouse space, which warehouse space is not required to be located in the Territory. The Company reserves the right to approve in advance any warehouse space used by the Distributor, including, without limitation, the sanitary and access conditions of any such facility The Products will be shipped to the Distributor upon the timely receipt of the Distributor's order. Orders are due in the Company's shipping office on, or before, Wednesday noon preceding the week in which the orders are to be shipped.

5) The Distributor agrees to provide, maintain, and bear all the expenses of storing and operating a truck, or trucks, trailers or any other vehicles of appropriate size and in good condition, as will enable the Distributor to make prompt deliveries to retailers within the Territory. The Company will furnish trademark and trade name emblems and other identifying signs and symbols employed by the Company in connection with its "Mike-sell's" branded Products, and the Company requires the distributors vehicles to display those emblems. The Distributor will not have the right to use the Company's name, or any of its trademarks, trade names, or other identifying signs or symbols on any truck or trailer that is not painted with the Company's colors.. If, and whenever, the Company's name, or any Company trademark, trade name, or other identifying signs or symbols appears on the truck or trailer, the name of the Distributor shall be conspicuously painted on each side of the truck or trailer followed by the words "Independent Distributor". After the Company's name, and any of its trademarks or emblems are affixed to the trucks or trailers used by the Distributor in the operation of its business, the Distributor will retain the right to use such trucks or trailers for any legal purpose.

6) The Distributor agrees to indemnify and hold the Company and its directors, officers, employees and representatives harmless for any and all losses, damages, and expenses, including reasonable attorney's fees, related to any claims, suits or liabilities arising out of, or any way connected with, the ownership and operation of the trucks, trailers and other vehicle used by the Distributor, or on its behalf, in conducting its business. In connection therewith, the Distributor agrees to carry, at its sole expense, comprehensive public liability insurance from a nationally recognized insurance carrier reasonably acceptable to the Company indemnifying the Distributor and the Company against all such losses, damages, and expenses with minimum coverage for bodily injuries, including, without limitation, death, up to $[redacted] for any one accident with a maximum deductible of $[redacted], and, for property damage of up to $[redacted] for any one accident. Such insurance, if the Distributor so desires, may be purchased by the Distributor through the Company's fleet insurance carrier at terms quoted by such insurance carrier. The name of the Company, as an insured, to the extent of its interest, will be added to each such insurance policy, and the Distributor shall at least annually, or upon written request by the Company, provide the Company with an appropriate certificate to this effect from its insurance carrier.

7) The Distributor agrees not to adopt or use any trademark, trade name, or other identifying sign, or symbol, employed by the Company without first obtaining the Company's permission, and, in the event such

permission is granted by the Company, the Distributor agrees to comply with any conditions of use in addition to those specified in this Agreement, which may be specified by the Company with respect to the use of any such trademarks, trade names, or other identifying signs or symbols. Upon the termination of this Agreement, by either party, the Distributor shall at its sole cost and expense promptly remove within (30) thirty days the Company name and any Company trademark, or trade name, or any other identifying signs or symbols employed by the Company, which then appear on any of Distributor's trucks, trailers or other vehicles or mechanisms used in its business.

8) The Distributor agrees to accept full responsibility for, and to pay, all of the costs and expenses incurred by it, or any agent, employee or representative authorized to act on its behalf, in the conduct of the wholesale business contemplated by this Agreement. The Distributor also agrees to pay all license and property taxes, income, and social security taxes, any required unemployment insurance contributions or workmen's compensation premiums, and all other governmental exactions related to the conduct of its business. The Distributor shall not be entitled to reimbursement by the Company for any such taxes, costs and expenses. The Distributor shall not contract any obligation, or incur any liability in the name of the Company, or for its account, nor accept from any party payment of any obligation due the Company, and the Distributor shall not, by express language, or by implication, make any representation suggesting that the relationship with the Company is anything other than that of an independent contractor licensed to sell the Products at wholesale.

9) The Company agrees, at its cost and expense, to provide the Distributor with up-to-date information concerning the Products and advertising programs, and, on appropriate occasions, to furnish the Distributor, as determined by the Company in its sole discretion, with assistance in advertising, displaying and merchandising of the Products, and in developing customer relations.

10) The Company and the Distributor expressly agree that the relationship between them, created by this Agreement, is that of a seller and independent buyer, and the Distributor shall remain, while this Agreement is in force, an independent contractor whose own judgment and sole discretion shall control activity and movement, the means and methods of distribution and all other matters pertaining to its business operations. The Distributor is not, and never shall be, an agent or employee of the Company, nor, for any reasons, subject to its direction or control. The Company shall have no right to require the Distributor, and the Distributor shall have no legal obligation to the Company; to work any specific place or time for any purpose; to devote any particular time or hours to the business; to follow any specified schedule or routes; to confine or extend business to any particular retail customers; to use any specified techniques for soliciting sales or displaying merchandise; to employ or refrain from employing helpers or substitutes; to make reports to the Company; or to keep records, other than such records pertaining to factored invoices, which are required for accurate customer invoicing. Because of the Company's obligation to comply with the requirements of this Paragraph 10, and because of the Company's financial interest in the Distributor's results *(i.e.,* the total sales arising from the Distributor's efforts to sell and promote the sale of all the Company's products), any suggestion, advice, advertising material, or other assistance offered to the Distributor by the Company, or by any of its sales representatives, shall be taken as having been offered for whatever use, if any, the Distributor's, independent judgment, may consider appropriate.

11) The Distributor understands that some distribution practices will, on occasion, require that the Company revise the geographical areas or territories for which its distributors have undertaken primary responsibility, including the Territory. The Company recognizes that such revisions should be kept to a minimum considering the expanding or contracting volume of sales of the Products, the population of areas affected, and the ability of its distributors to cover their respective territories effectively, while, at the same time, maintaining profits at a reasonable level. Therefore, notwithstanding any other language in this Agreement, it is specifically agreed:

a) The Company, may, from time to time, in the exercise of its sole judgment, increase or reduce the size of, replace or transfer/reassign any retail outlet to another distributor, or otherwise change the Territory.

b) No Territory revision shall be made by the Company within the first six (6) months following the date of this Agreement.

c) The Company will notify the Distributor that it is considering a Territory revision in advance of the effective date thereof; and before making a decision as to the new boundaries of the Territory, the Company will

consult with the Distributor relative to the changes that are being considered. The Distributor will cooperate with the Company by furnishing information relative to weekly net sales to the customers who might be affected, and by making suggestions believed to be in the best interest of the Distributor and the Company. When the Company makes a final decision, which it may make at its sole discretion, after considering the information and suggestions received from the Distributor, and from the other independent distributors to be affected, the Company will notify the Distributor prior to the effective date of the revision as to the boundaries of Territory, as revised, and as to the effective date of the revision and without recourse from the Distributor.

d) Subject to the Company's compliance with the foregoing provisions of this Paragraph 11, the Distributor agrees that commencing as of the effective date of any such revision, the Distributor will exercise primary responsibility for fully and completely servicing the new Territory for which it has been designated as being primarily responsible; and Exhibit A attached hereto shall be treated as having been amended accordingly.

12) This Agreement shall continue in effect from the date of its execution and until it is terminated by one of the following events:

a) This Agreement may be voluntarily terminated by an agreement, in writing, by both the Distributor and an authorized agent of the Company.

b) This Agreement shall automatically terminate (i) upon the death of a proprietary Distributor, *i.e.*, any Distributor that is other than a corporation or limited liability company or (ii) if the Distributor (A) is dissolved or liquidated, (B) becomes insolvent, (C) has a petition under any chapter of the bankruptcy laws filed by or against it, (D) makes a general assignment for the benefit of its creditors, or (E) has a receiver requested for or appointed to it.

c) The Company may terminate this Agreement (i) upon a material breach of any of Distributor's obligations under this Agreement, which breach is not cured within ten (10) days of notice thereof by the Company or (ii) upon a change of control or sale of substantially all of the assets of the Distributor, unless the Distributor has notified the Company of such proposed change of control or sale at least thirty (30) days prior to the effectiveness thereof.

d) Either party may terminate this Agreement, at will, with or without cause, by giving thirty (30) days' prior written notice to the other party. Any such notice given by the Company must be signed by an officer of the Company.

e) By whichever of the foregoing events this Agreement is terminated, all existing orders for Products, not then delivered to the Distributor shall be deemed canceled as of the effective date of the termination; but, the termination shall not affect the right or liabilities of the parties with respect to Products previously delivered to the Distributor, or with respect to any indebtedness then owing by either party to the other, for any reason.

f) Notwithstanding anything in this Agreement to the contrary, if the Distributor should terminate this Agreement without giving the Company the written notice required by subparagraph (d) of this Paragraph 12, the Company shall have no obligation to the Distributor. If the Company should terminate this Agreement without giving the Distributor thirty (30) days' prior written notice of such termination, the Company shall be obligated to pay or credit the Distributor the sum of [redacted] ($[redacted]), it being agreed that the said payment shall constitute the Distributor's liquidated damages for the Company's breach of the 30-days' notice requirement.

g) Following notice of termination under subparagraph (a) of this Paragraph 12, the Distributor and the Company will continue to perform as this Agreement requires until the effective date of the termination without any variance in their normal operations.

h) The Distributor covenants and agrees that during a period of twelve (12) months from the effective date of any termination of this Agreement for whatever reason, except a termination by the Company, without cause, under subparagraph (d) of this Paragraph 12, the Distributor shall, and shall cause its officers, employees, agents and representatives to, refrain from selling or offering for sale, either directly, or indirectly, for itself, or as the agent of a third party, any Competing Snack Food Products in the Territory, as that Territory is revised by the Company from time to time. For purposes of this Agreement, *"Competing Snack Food Products"* means products of the same kind as those the Distributor has been purchasing from the Company during the twelve

(12) month period immediately preceding the termination date of this Agreement, but which have been manufactured or supplied to the Distributor by a third party who is in competition with the Company. Furthermore, the Distributor acknowledges and agrees that it has no right to sell the Territory or to assign the Territory to a third party after the termination of this Agreement. This subparagraph (h) shall survive any termination of this Agreement.

13) The Distributor covenants and agrees that during the term of this agreement that the Distributor shall, and shall cause its officers, employees, agents and representatives to, refrain from selling or offering for sale, either directly, or indirectly, for itself, or as the agent of a third party, any other products or Brands of food products in the Territory, as that territory is revised by the Company from time to time, without prior written consent from the Company to the receiving or distribution of said products or Brands.

14) This Agreement, which contains the entire understanding between the parties, supersedes, and replaces any, and all, prior agreements of any nature and description, whether oral or written, which may have previously existed between the Distributor and the Company, or any oftheir predecessors.

15) No representatives, promises, provisions, terms, conditions, obligations, or understandings, express or implied, oral or written, other than those herein specifically set forth shall be binding on either party hereto. Except as otherwise provided in this Agreement, including, without limitation, with respect to the Company's right from time to time to amend Exhibit A of this Agreement, it is further understood and agreed that none of the provisions, terms, or conditions of this Agreement shall be waived, altered, abridged, modified, or amended, except by an instrument in writing executed by the Distributor and an authorized agent of the Company.

16) The failure of either party to insist upon compliance with any of the provisions hereof shall not be construed to be a waiver or amendment of the provisions, of the right of the aggrieved party thereafter to insist on the provision, or to take steps to remedy or recover damages for the noncompliance. Further, it is understood and agreed that, if any provision of this Agreement shall contravene, or be held invalid under any applicable state or federal law, or municipal ordinance, such contravention or invalidity shall not affect the whole Agreement, which thereafter shall be construed as not containing the particular part, term or provision held to be invalid; and the rights and obligations of the parties hereto shall be construed and enforced accordingly.

17) Any notice or communications hereunder will be provided in writing and will be deemed to have been duly given when delivered personally or by overnight courier, or mailed (certified or registered mail, postage prepaid, return receipt requested), or sent by telegram, receipt confirmed, to the address provided below the party's name on the signature page of this Agreement (or to such other address or addresses as either party may by like notice designate). Notwithstanding the foregoing, the Distributor agrees and acknowledges (a) that day-to-day communications regarding ordering, invoicing and payment may be made via e-mail or other electronic methods, and (b) that the Company reserves the right to require the Distributor to use and accept any other commercially reasonable means of communication with respect to day-to-day operations as the Company sees fit from time to time.

18) This Agreement may be assigned by the Company, and shall inure to the benefit of its successors, and assigns. This Agreement shall not be assigned or transferred by the Distributor, by operation of law or otherwise, without the prior written consent of the Company.

19) There may be attached hereto, and made a part hereof as Exhibit B, certain additional stipulations to which both parties have agreed as indicated by their initials on each of the pages of Exhibit B. In the event of any conflict between the foregoing language of this Agreement and the language of the stipulations set forth in Exhibit J.I, the express language of the stipulations in Exhibit B shall control.

20) This Agreement shall exclusively be governed by and be construed in accordance with the laws of the State of Ohio applicable to contracts made and to be performed in such state without regard to any conflicts of laws principles, further any and all legal actions involving this Agreement are to be litigated in Montgomery County Ohio.

21) This Agreement may be executed and delivered in any number of counterparts, all of which when

executed and delivered shall have the same force and effect of an original.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the day and year first above written.

WITNESS

Robert W. Thompson
Director Sales Operations

DISTRIBUTOR

By: _____
Charles Thomas Morris
d.b.a. The Big TMT Enterprize LLC.

ADDRESS: 613 Winchester Street
New Carlisle, Ohio 45344.

ATTENTION: Charles T. Morris

MIKE-SELL'S POTATO CHIP COMPANY

By: _____
Charles S. Shive Jr.
Chief Executive Officer

333 Leo Street
P.O. Box 115
Dayton, OH 45404-0115

Attention: Executive VP Sales & Marketing

EXHIBIT "A"

MIKE-SELL'S POTATO CHIP COMPANY.
CHARLES THOMAS MORRIS
THE BIG TMT ENTERPRIZE LLC.
EFFECTIVE: September 18, 2016.

The territories Springfield / Piqua Ohio and Richmond Indiana represent the areas referred to as exhibit "A", in Section 1 of the Independent Distributor Contract and are described and outlined as follows:

The territory includes all of the following Ohio Counties: Logan and Champaign

This territory includes portions of the following Ohio Counties:

In Miami County the area North and East Casstown-Clark Road to Hwy 589, then North and East of Hwy 589 to Hwy 36 Then West on Hwy 36 to Hwy 14 then South on Hwy 14 then West on CR 17 to I75 then South on I75 to 25 A North to CR 31 then West to Ohio 41 Southeast to Ranch Road South to CR 21 then West to Ohio 48 South to Hwy 38 West to Ohio 721 South to Hwy 82 West County Line.

In Clark County excluding the area West of ST 339 North to Weinland St., then North to Sycamore Road, then East to Dille Road North to Tulip RD East, then to North Lake Road North to Hwy 40, then East to North Dayton Lakeview Road North to Hwy 41 to the County Line. It also excludes the portion including both sides of SR 68 north from the Clark County line to SR 794 East to SR 72 South, back to the Clark County Line.

In Green County the Eastern border and Southern is the county line on the south going West to SR 42, then North on SR 42 Hwy 35 the West on Hwy 35 to Trebein RD North, then North on Hilltop Rd to SR 235, then South on SR 235 to SR 68, then North on SR 68 to Clifton Road Northeast to OH 72 North, then to Hwy 794 West, then West to Hwy 68.

All of Darke County North of Hwy 82 and West of a line formed by Hwy 49 South to Hwy 722, then West to Hwy 127 to the County Line.

All of Preble Counties West of a line formed by Hwy 127 South to Hwy 15 Northeast to East Avenue South to Hwy 122 East, then CR 5 South to West Consolidated road SR 732 West to Hwy 17, to the Ohio State Line.

In Indiana the territory includes: All of Wayne County South of I 70 West and East of Hwy 1. All of Randolph County South and East of a line formed by Hwy 27 South from the northern County Line the West on Hwy 28, then South on Hwy 1.

All of Wayne County East of a line formed by Hwy 1.

Route 131 Midland Ohio contains the area in the County of Butler and Warren Ohio as here defined:

Beginning at the Butler Northwestern County Line the Northern Boundary follows the County Line East into Warren County, then to Hwy 123 Southeast, then to Hwy 230 East to Hwy 741, then back West on Hwy 230 West to I 75 South, then to Hendrickson Road West and on to Cincinnati Dayton Road South, then to Hwy 73 West to North Elk Creek Road, then to Howe Road East onto Trenton Franklin Road North, then to Hwy 122 North and West back to the Northern Butler County Line.

All road boundaries are the centerlines except the area does not contain any accounts on either side of Hwy 123 in Warren County.

If there should ever become a discrepancy as to territory boundaries between Distributorships, after full investigation and interpretation by the Company, the final decision can be made by the Company, without recourse from the Distributors involved, as to which Distributor is to service the territory in question.

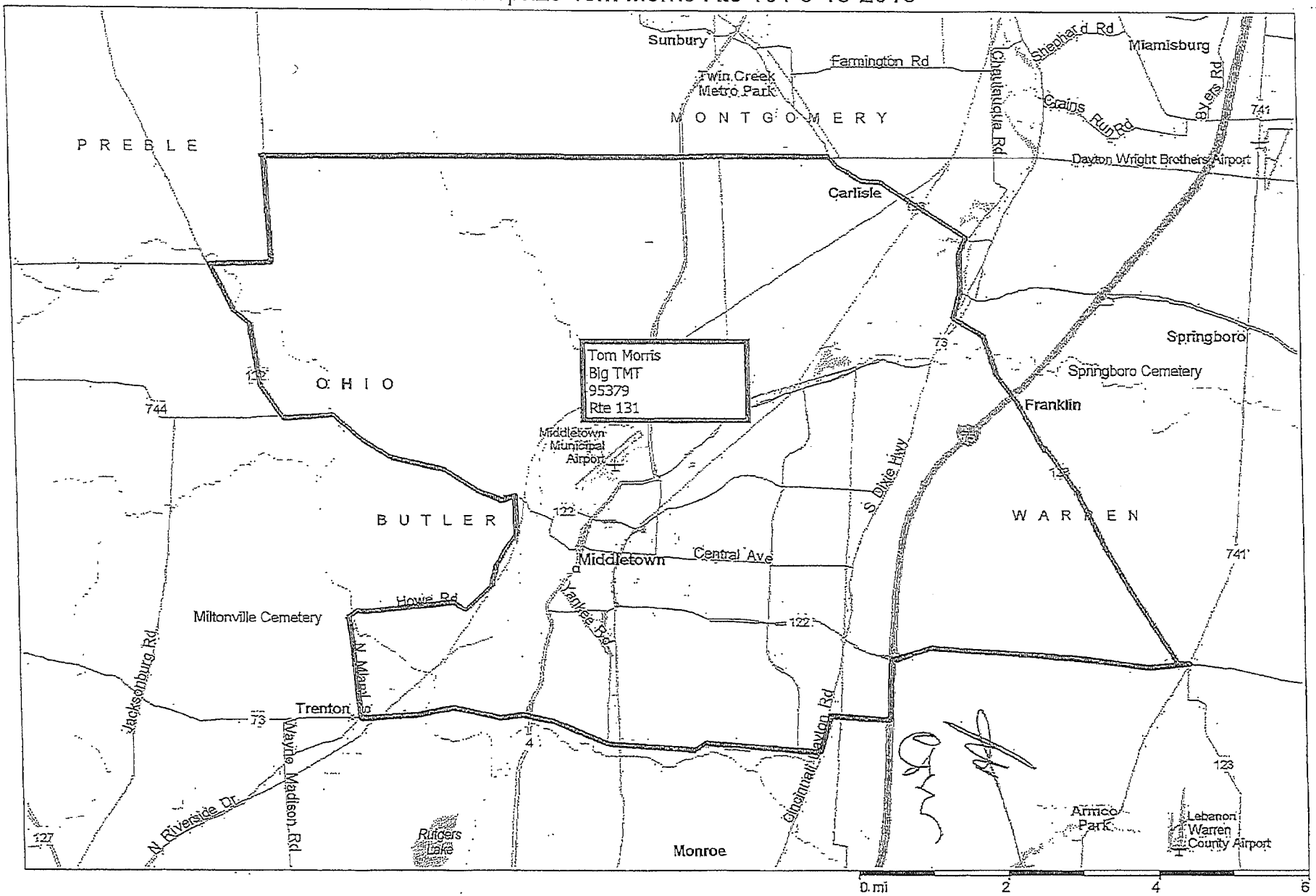
MIKE-SELLS

AGREED- ROBERT W. THOMPSON
DIRECTOR SALES OPERATIONS

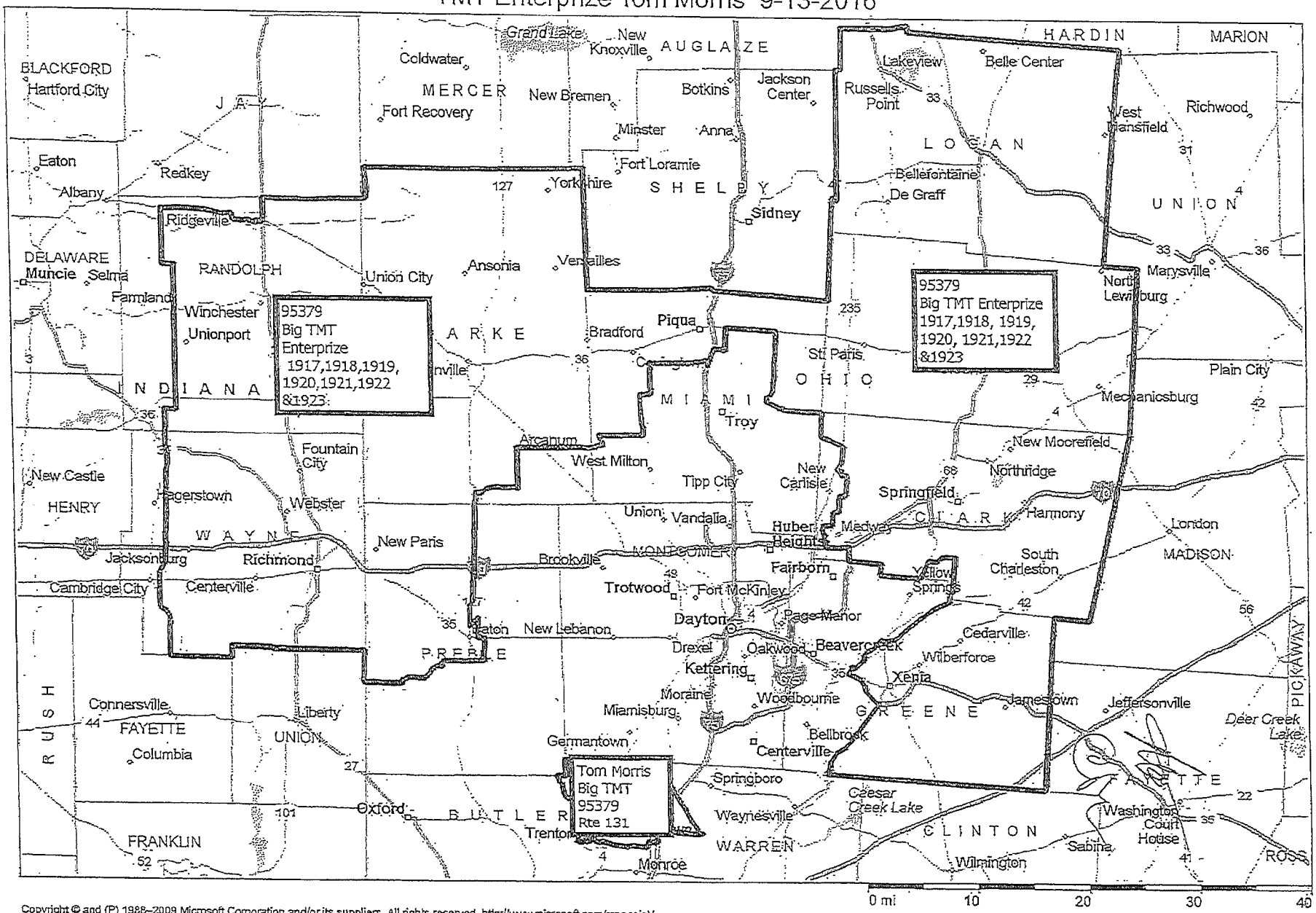
DISTRIBUTOR

AGREED- CHARLES T. MORRIS
d.b.a THE BIG TMT ENTERPRIZE LLC.

TMT Enterprize Tom Morris Rte 131 9-13-2016



TMT Enterprize Tom Morris 9-13-2016



INDEPENDENT DISTRIBUTOR AGREEMENT

THIS INDEPENDENT DISTRIBUTOR AGREEMENT (this *"Agreement"*) is entered into this 2th day of September, 2016, by and between Mike-sell's Potato Chip Company, herein called the *"Company"*, and, Lisa Ann Krupp d.b.a. D.L.M. Distributing, as distributor, herein called the *"Distributor"*.

WITNESSETH

WHEREAS, as a result of, among other things, the Company's program of research and product development and extensive advertisement of the Products in advertising media, there has been created certain goodwill and a continuing demand for the Products.

WHEREAS, the Distributor is an individual proprietor or entity with adequate capital, either engaged, or desiring to become engaged, in the business of buying and selling snack food products to food stores, restaurants, places of amusement, and other retail outlets in areas where the Products have heretofore been, or will be advertised and sold.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Distributor do hereby agree as follows:

1) The Company grants to the Distributor the nonexclusive right, subject to the terms and conditions set forth herein, to buy, sell, and distribute the Products at wholesale in the Territory (as may be modified from time to time) described on Exhibit A attached hereto. The Distributor accepts this right and agrees to exercise primary responsibility for the wholesale distribution of the Products within the boundaries of the Territory, and, in connection therewith, to use its best efforts to sell, promote the sale of, and distribute the Products to retailers located within the Territory. The Distributor agrees that it will buy the Products only from the Company or such other persons as the Company shall from time to time identify and will sell and solicit sales of the Products only in the Territory. The Distributor understands that the Company may elect to sell to institutional suppliers, vending companies, and/or select company accounts as identified by the Company on a direct shipment basis with no compensation due the Distributor. If there should become a dispute as to territory boundaries between distributorships, after investigation and interpretation by the Company, the final decision may be made by the Company, without recourse from the distributors involved, as to which distributor is to service the territory in question.

2) The Company agrees to sell and deliver to the Distributor, in the quantities required for the Distributor's wholesale business, the Products that are being made available by the Company to other independent distributors authorized to wholesale the Company's snack food products in the Company's same sales region, or which may hereafter be made available by the Company to such distributors as this line of Products is changed from time to time and the Distributor is expected to sell the product line available. However, the Company shall not be liable for delays in delivery due to failures in manufacturing, product shortages, strikes, transportation shortages, or causes beyond the control of the Company, such as acts of terror, war, riots, fire, Acts of God and other events or circumstances beyond the control of the Company whether similar or dissimilar to the foregoing. The Distributor agrees to make payments for the Products as follows:

a) The Distributor will pay the Company, as the purchase price for each type of Product delivered, the Company's then current suggested wholesale price as determined by the Company in its sole discretion from time to time, herein called the *"store-to-door price"*, less a Distributor margin of (i) [redacted] percent ([redacted]%), in the case of Mike-sell's manufactured products; (ii) [redacted] percent ([redacted]%), in the case of "Mike-sell's" allied products (iii) [redacted] percent ([redacted]%) in the case of partner brands and Private Label products will be at (iv) [redacted] percent ([redacted]%), each, a *"Distributor Margin"*. The Distributor understands and agrees that the Company may in its sole discretion, at least once annually, adjust upward or downward any Distributor Margins; provided, however, that the Company must provide the Distributor written notice at least thirty (30) days prior to any such Distributor Margin change taking effect.

b) The Distributor will be issued a credit by the Company for Products returned to the Company that were defective or damaged when received, or salable Products that were shipped to the Distributor as a result of an error by the Company; provided, however, that to receive any such credit the Distributor must either refuse to accept such Products or, if it has received any such Products, it must notify the Company thereof within two (2) days of having received such Products.

c) Returnable and reusable cartons containing Products manufactured by the Company will be charged to the Distributor, and upon the timely return of such cartons the Distributor will be credited. In addition, if the Distributor fails to return in any six (6) month period ending on June 30 and December 31 in excess of [redacted] percent ([redacted]%) of the returnable and reusable cartons it received during such sixth-month period, then the Distributor shall be charged the replacement cost per carton for all returnable and reusable cartons that were not returned by it to the Company during such period.

d) The net amount of the invoice for each shipment of Product received by the Distributor shall be remitted by Automated Clearing House or ACH debits or credits, as provided in subparagraph (f) of this Paragraph 2, by the Distributor promptly upon receipt of such invoice. The Company will accept, in lieu of cash, as payment for any amounts owed to it by the Distributor for purchases of Products, invoices properly stamped and signed by authorized representative(s) of Distributor's charge-account customers whose credit the Company has prior thereto investigated and found to be acceptable, provided such invoices are submitted to the Company no later than three (3) days after the delivery of the Products to the customer. By delivery of such properly stamped and signed charge-account invoices to the Company, the Distributor warrants the genuineness of the same as evidence of an open account indebtedness owed by the customer for Products purchased from the Distributor. By accepting such charge-account invoices from the Distributor, the Company acknowledges receipt from the Distributor of the net amount provided in such charge-account invoices as owed by the customer; and, if these amounts are in fact owed, the Company will have no recourse against the Distributor by reason of the failure of the customer to pay such invoices. These authorized charge-account invoices, also sometimes referred to as "Factored Invoices", will be credited to the Distributor.

e) THE DISTRIBUTOR AGREES TO FULLY AND CONSISTENTLY ADHERE TO THE DELIVERY AND MERCHANDISE STANDARDS PRESCRIBED BY ITS CUSTOMERS AND BY THE COMPANY FROM TIME TO TIME AND TO T-COM ALL CHARGE/FACTORED INVOICES TO THE COMPANY, WITHOUT EXCEPTION BY 9:00P.M. OF EACH BUSINESS DAY AND BY 9:00P.M. EACH SATURDAY. (Please note that the required Saturday T-Com allows the Company to download to the Distributor's handheld route accounting computer customer Product pricing for the following week and to bill certain chain accounts on a timely basis for weekly charges.) In addition, the Distributor shall promptly submit to the Company properly stamped and signed by authorized representative(s) of Distributor's customers copies of delivery invoices required for chain accounts requiring centralized billing. If the Distributor fails to submit these invoices for any given week by Thursday of the following week, the Company may charge and debit the Distributor's account a minimum of [redacted] ($[redacted]) per week until such invoices are submitted by the Distributor. (Please note that such failure by the Distributor to timely submit invoices results in the Company having to delay billing customer accounts.)

f) The Distributor agrees to execute an authorization agreement for automatic ACH debits or credits by the Company (any such account so established, an *"ACH Account"*), whereby the Company shall have, among other things, the authority to debit or credit, as the case may be, Distributor's ACH Account each Thursday for the prior week's ending balance. If the Company is unable to withdraw the full balance of amounts owed by the Distributor from the Distributor's ACH Account because such account has insufficient funds, the Company may charge and debit the Distributor's ACH Account a minimum of [redacted] ($[redacted]) and interest equal to the lesser of the daily equivalent of [redacted] percent ([redacted]%) per annum of such unpaid amounts per year, or the highest rate then permitted by applicable law, for each day such unpaid amounts are past due.

g) The Distributor understands that the Company may change its computer system from time to time and agrees that the provisions of subparagraphs (e) and (f) of this Paragraph 2 may be modified by the Company to reflect changes necessitated by any new computer system.

3) The Distributor shall have the right to sell the Products purchased from the Company at such prices as it negotiates with its customers; however, it is understood that the Company negotiates the sales price of Products to certain chain stores and that, as a result, the Distributor cannot negotiate higher sales prices with the particular outlets of that chain store in the Territory. If the Distributor chooses to sell to such chain store outlets in the Territory, the Distributor must sell the Products to such chain store outlets at prices not greater than those specified by the Company. If the Distributor chooses not to sell to the outlets of the chain store in the Territory, the Distributor agrees to notify the Company of that fact in advance and agrees to allow the Company to have another distributor or representative of the Company sell to such chain store outlets. Further, from time to time, the Company may establish other maximum pricing for certain Products, for certain customers and/or certain situations; the Distributor shall adhere to such maximum pricing as so established by the Company, provided that the Distributor shall not be required to sell the Products at any particular price at or above a minimum price if such requirement would be unlawful. In all cases, applicable federal and state statutes pertaining to price discrimination shall be obeyed.

4) The Distributor agrees to maintain sufficient inventory of the Products to meet the needs of retailers in the Territory. The Distributor shall be responsible for protecting the Products as deemed appropriate, after they have been delivered, against theft, fire, and other loss or damage; and the Company shall have no liability in this respect, unless the loss or Damage is caused by negligence attributable to the Company. The Company will supply the Products to the Distributor's warehouse. When a Distributor does not have enough sales volume to purchase or receive full loads (approximately 1,000 cases), the Distributor will be required to share warehouse space, which warehouse space is not required to be located in the Territory. The Company reserves the right to approve in advance any warehouse space used by the Distributor, including, without limitation, the sanitary and access conditions of any such facility The Products will be shipped to the Distributor upon the timely receipt of the Distributor's order. Orders are due in the Company's shipping office on, or before, Wednesday noon preceding the week in which the orders are to be shipped.

5) The Distributor agrees to provide, maintain, and bear all the expenses of storing and operating a truck, or trucks, trailers or any other vehicles of appropriate size and in good condition, as will enable the Distributor to make prompt deliveries to retailers within the Territory. The Company will furnish trademark and trade name emblems and other identifying signs and symbols employed by the Company in connection with its "Mike-sell's" branded Products, and the Company requires the distributors vehicles to display those emblems. The Distributor will not have the right to use the Company's name, or any of its trademarks, trade names, or other identifying signs or symbols on any truck or trailer that is not painted with the Company's colors.. If, and whenever, the Company's name, or any Company trademark, trade name, or other identifying signs or symbols appears on the truck or trailer, the name of the Distributor shall be conspicuously painted on each side of the truck or trailer followed by the words "**Independent Distributor**". After the Company's name, and any of its trademarks or emblems are affixed to the trucks or trailers used by the Distributor in the operation of its business, the Distributor will retain the right to use such trucks or trailers for any legal purpose.

6) The Distributor agrees to indemnify and hold the Company and its directors, officers, employees and representatives harmless for any and all losses, damages, and expenses, including reasonable attorney's fees, related to any claims, suits or liabilities arising out of, or any way connected with, the ownership and operation of the trucks, trailers and other vehicle used by the Distributor, or on its behalf, in conducting its business. In connection therewith, the Distributor agrees to carry, at its sole expense, comprehensive public liability insurance from a nationally recognized insurance carrier reasonably acceptable to the Company indemnifying the Distributor and the Company against all such losses, damages, and expenses with minimum coverage for bodily injuries, including, without limitation, death, up to $[redacted] for any one accident with a maximum deductible of $[redacted], and, for property damage of up to $[redacted] for any one accident. Such insurance, if the Distributor so desires, may be purchased by the Distributor through the Company's fleet insurance carrier at terms quoted by such insurance carrier. The name of the Company, as an insured, to the extent of its interest, will be added to each such insurance policy, and the Distributor shall at least annually, or upon written request by the Company, provide the Company with an appropriate certificate to this effect from its insurance carrier.

7) The Distributor agrees not to adopt or use any trademark, trade name, or other identifying sign, or symbol, employed by the Company without first obtaining the Company's permission, and, in the event such

permission is granted by the Company, the Distributor agrees to comply with any conditions of use in addition to those specified in this Agreement, which may be specified by the Company with respect to the use of any such trademarks, trade names, or other identifying signs or symbols. Upon the termination of this Agreement, by either party, the Distributor shall at its sole cost and expense promptly remove within (30) thirty days the Company name and any Company trademark, or trade name, or any other identifying signs or symbols employed by the Company, which then appear on any of Distributor's trucks, trailers or other vehicles or mechanisms used in its business.

8) The Distributor agrees to accept full responsibility for, and to pay, all of the costs and expenses incurred by it, or any agent, employee or representative authorized to act on its behalf, in the conduct of the wholesale business contemplated by this Agreement. The Distributor also agrees to pay all license and property taxes, income, and social security taxes, any required unemployment insurance contributions or workmen's compensation premiums, and all other governmental exactions related to the conduct of its business. The Distributor shall not be entitled to reimbursement by the Company for any such taxes, costs and expenses. The Distributor shall not contract any obligation, or incur any liability in the name of the Company, or for its account, nor accept from any party payment of any obligation due the Company, and the Distributor shall not, by express language, or by implication, make any representation suggesting that the relationship with the Company is anything other than that of an independent contractor licensed to sell the Products at wholesale.

9) The Company agrees, at its cost and expense, to provide the Distributor with up-to-date information concerning the Products and advertising programs, and, on appropriate occasions, to furnish the Distributor, as determined by the Company in its sole discretion, with assistance in advertising, displaying and merchandising of the Products, and in developing customer relations.

10) The Company and the Distributor expressly agree that the relationship between them, created by this Agreement, is that of a seller and independent buyer, and the Distributor shall remain, while this Agreement is in force, an independent contractor whose own judgment and sole discretion shall control activity and movement, the means and methods of distribution and all other matters pertaining to its business operations. The Distributor is not, and never shall be, an agent or employee of the Company, nor, for any reasons, subject to its direction or control. The Company shall have no right to require the Distributor, and the Distributor shall have no legal obligation to the Company; to work any specific place or time for any purpose; to devote any particular time or hours to the business; to follow any specified schedule or routes; to confine or extend business to any particular retail customers; to use any specified techniques for soliciting sales or displaying merchandise; to employ or refrain from employing helpers or substitutes; to make reports to the Company; or to keep records, other than such records pertaining to factored invoices, which are required for accurate customer invoicing. Because of the Company's obligation to comply with the requirements of this Paragraph 10, and because of the Company's financial interest in the Distributor's results *(i.e.,* the total sales arising from the Distributor's efforts to sell and promote the sale of all the Company's products), any suggestion, advice, advertising material, or other assistance offered to the Distributor by the Company, or by any of its sales representatives, shall be taken as having been offered for whatever use, if any, the Distributor's, independent judgment, may consider appropriate.

11) The Distributor understands that some distribution practices will, on occasion, require that the Company revise the geographical areas or territories for which its distributors have undertaken primary responsibility, including the Territory. The Company recognizes that such revisions should be kept to a minimum considering the expanding or contracting volume of sales of the Products, the population of areas affected, and the ability of its distributors to cover their respective territories effectively, while, at the same time, maintaining profits at a reasonable level. Therefore, notwithstanding any other language in this Agreement, it is specifically agreed:

a) The Company, may, from time to time, in the exercise of its sole judgment, increase or reduce the size of, replace or transfer/reassign any retail outlet to another distributor, or otherwise change the Territory.

b) No Territory revision shall be made by the Company within the first six (6) months following the date of this Agreement.

c) The Company will notify the Distributor that it is considering a Territory revision in advance of the effective date thereof; and before making a decision as to the new boundaries of the Territory, the Company will

consult with the Distributor relative to the changes that are being considered. The Distributor will cooperate with the Company by furnishing information relative to weekly net sales to the customers who might be affected, and by making suggestions believed to be in the best interest of the Distributor and the Company. When the Company makes a final decision, which it may make at its sole discretion, after considering the information and suggestions received from the Distributor, and from the other independent distributors to be affected, the Company will notify the Distributor prior to the effective date of the revision as to the boundaries of Territory, as revised, and as to the effective date of the revision and without recourse from the Distributor.

d) Subject to the Company's compliance with the foregoing provisions of this Paragraph 11, the Distributor agrees that commencing as of the effective date of any such revision, the Distributor will exercise primary responsibility for fully and completely servicing the new Territory for which it has been designated as being primarily responsible; and Exhibit A attached hereto shall be treated as having been amended accordingly.

12) This Agreement shall continue in effect from the date of its execution and until it is terminated by one of the following events:

a) This Agreement may be voluntarily terminated by an agreement, in writing, by both the Distributor and an authorized agent of the Company.

b) This Agreement shall automatically terminate (i) upon the death of a proprietary Distributor, *i.e.*, any Distributor that is other than a corporation or limited liability company or (ii) if the Distributor (A) is dissolved or liquidated, (B) becomes insolvent, (C) has a petition under any chapter of the bankruptcy laws filed by or against it, (D) makes a general assignment for the benefit of its creditors, or (E) has a receiver requested for or appointed to it.

c) The Company may terminate this Agreement (i) upon a material breach of any of Distributor's obligations under this Agreement, which breach is not cured within ten (10) days of notice thereof by the Company or (ii) upon a change of control or sale of substantially all of the assets of the Distributor, unless the Distributor has notified the Company of such proposed change of control or sale at least thirty (30) days prior to the effectiveness thereof.

d) Either party may terminate this Agreement, at will, with or without cause, by giving thirty (30) days' prior written notice to the other party. Any such notice given by the Company must be signed by an officer of the Company.

e) By whichever of the foregoing events this Agreement is terminated, all existing orders for Products, not then delivered to the Distributor shall be deemed canceled as of the effective date of the termination; but, the termination shall not affect the right or liabilities of the parties with respect to Products previously delivered to the Distributor, or with respect to any indebtedness then owing by either party to the other, for any reason.

f) Notwithstanding anything in this Agreement to the contrary, if the Distributor should terminate this Agreement without giving the Company the written notice required by subparagraph (d) of this Paragraph 12, the Company shall have no obligation to the Distributor. If the Company should terminate this Agreement without giving the Distributor thirty (30) days' prior written notice of such termination, the Company shall be obligated to pay or credit the Distributor the sum of [redacted] ($[redacted]), it being agreed that the said payment shall constitute the Distributor's liquidated damages for the Company's breach of the 30-days' notice requirement.

g) Following notice of termination under subparagraph (a) of this Paragraph 12, the Distributor and the Company will continue to perform as this Agreement requires until the effective date of the termination without any variance in their normal operations.

h) The Distributor covenants and agrees that during a period of twelve (12) months from the effective date of any termination of this Agreement for whatever reason, except a termination by the Company, without cause, under subparagraph (d) of this Paragraph 12, the Distributor shall, and shall cause its officers, employees, agents and representatives to, refrain from selling or offering for sale, either directly, or indirectly, for itself, or as the agent of a third party, any Competing Snack Food Products in the Territory, as that Territory is revised by the Company from time to time. For purposes of this Agreement, *"Competing Snack Food Products"* means products of the same kind as those the Distributor has been purchasing from the Company during the twelve

(12) month period immediately preceding the termination date of this Agreement, but which have been manufactured or supplied to the Distributor by a third party who is in competition with the Company. Furthermore, the Distributor acknowledges and agrees that it has no right to sell the Territory or to assign the Territory to a third party after the termination of this Agreement. This subparagraph (h) shall survive any termination of this Agreement.

13) The Distributor covenants and agrees that during the term of this agreement that the Distributor shall, and shall cause its officers, employees, agents and representatives to, refrain from selling or offering for sale, either directly, or indirectly, for itself, or as the agent of a third party, any other products or Brands of food products in the Territory, as that territory is revised by the Company from time to time, without prior written consent from the Company to the receiving or distribution of said products or Brands.

14) This Agreement, which contains the entire understanding between the parties, supersedes, and replaces any, and all, prior agreements of any nature and description, whether oral or written, which may have previously existed between the Distributor and the Company, or any of their predecessors.

15) No representatives, promises, provisions, terms, conditions, obligations, or understandings, express or implied, oral or written, other than those herein specifically set forth shall be binding on either party hereto. Except as otherwise provided in this Agreement, including, without limitation, with respect to the Company's right from time to time to amend Exhibit A of this Agreement, it is further understood and agreed that none of the provisions, terms, or conditions of this Agreement shall be waived, altered, abridged, modified, or amended, except by an instrument in writing executed by the Distributor and an authorized agent of the Company.

16) The failure of either party to insist upon compliance with any of the provisions hereof shall not be construed to be a waiver or amendment of the provisions, of the right of the aggrieved party thereafter to insist on the provision, or to take steps to remedy or recover damages for the noncompliance. Further, it is understood and agreed that, if any provision of this Agreement shall contravene, or be held invalid under any applicable state or federal law, or municipal ordinance, such contravention or invalidity shall not affect the whole Agreement, which thereafter shall be construed as not containing the particular part, term or provision held to be invalid; and the rights and obligations of the parties hereto shall be construed and enforced accordingly.

17) Any notice or communications hereunder will be provided in writing and will be deemed to have been duly given when delivered personally or by overnight courier, or mailed (certified or registered mail, postage prepaid, return receipt requested), or sent by telegram, receipt confirmed, to the address provided below the party's name on the signature page of this Agreement (or to such other address or addresses as either party may by like notice designate). Notwithstanding the foregoing, the Distributor agrees and acknowledges (a) that day-to-day communications regarding ordering, invoicing and payment may be made via e-mail or other electronic methods, and (b) that the Company reserves the right to require the Distributor to use and accept any other commercially reasonable means of communication with respect to day-to-day operations as the Company sees fit from time to time.

18) This Agreement may be assigned by the Company, and shall inure to the benefit of its successors, and assigns. This Agreement shall not be assigned or transferred by the Distributor, by operation of law or otherwise, without the prior written consent of the Company.

19) There may be attached hereto, and made a part hereof as Exhibit B, certain additional stipulations to which both parties have agreed as indicated by their initials on each of the pages of Exhibit B. In the event of any conflict between the foregoing language of this Agreement and the language of the stipulations set forth in Exhibit B, the express language of the stipulations in Exhibit B shall control.

20) This Agreement shall exclusively be governed by and be construed in accordance with the laws of the State of Ohio applicable to contracts made and to be performed in such state without regard to any conflicts of laws principles, further any and all legal actions involving this Agreement are to be litigated in Montgomery County Ohio.

21) This Agreement may be executed and delivered in any number of counterparts, all of which when

executed and delivered shall have the same force and effect of an original.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the day and year first above written.

WITNESS

Phillip K. Kazor
Executive V P Sales & Marketing

DISTRIBUTOR

By: _____
Lisa Ann Krupp
d.b.a. BLM Distributing
Mike-sell's Distributor

ADDRESS: 1046 Lagonda Ave
Springfield, OH 45503.

Attention: Lisa A. Krupp

MIKE-SELL'S POTATO CHIP COMPANY

By: _____
Charles S. Shive Jr.
Chief Executive Officer

333 Leo Street
P.O. Box 115
Dayton, OH 45404-0115

Attention: Executive VP Sales & Marketing

EXHIBIT "A"

MIKE-SELL'S POTATO CHIP COMPANY
LISA ANN KRUPP
INDEPENDENT DISTRIBUTOR
EFFECTIVE – September 4th, 2016.

Dated September 2nd, 2016.

The distributor 95387 Route 1925, territory referred to as Exhibit "A", Section 1, Page 1 of the Independent Distributors Contract is described and outline as follows:

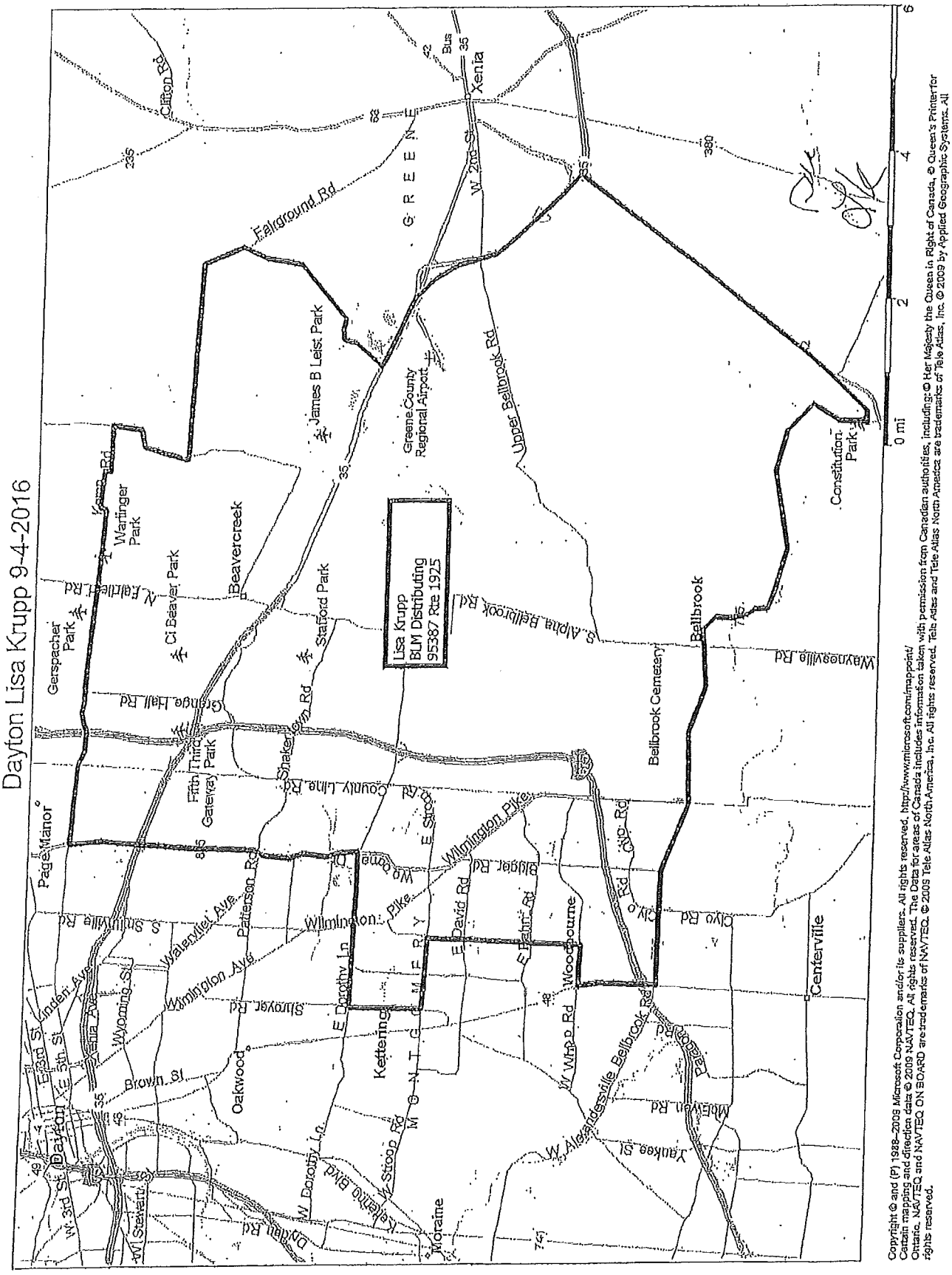
The territory is located in Ohio and contains the sections of the Counties of Montgomery and Green as outlined here:

The Territory starts in the Northwest at the corner of Woodman Drive and Kemp Road, then East on Kemp Road including both sides of Kemp to Beaver Valley Road, then South to Fairground Road, then to Hill Top Road, then Southwest to Trabein Road South to Hwy 35 East, then to US 42 South, then to Old US 42 South, then to Hwy 725 Northwest to Far Hills, then North on Far Hills to Woodbourne, then East to Marshall Road, then North on Marshall Road to East Stroop, then West on East Stroop to Shroyer Road, then North to East Dorothy Lane, then East to Woodman Drive, then North on Woodman Drive to the starting Point.

The account called Yum Yum Drive Thru 635 Spinning Road is excluded from this Territory.

If there should ever become a discrepancy as to territory boundaries between Distributorships, after full investigation and interpretation by the Company, the final decision can be made by the Company, without recourse from the Distributors involved, as to which Distributor is to service the territory in question.

MIKE-SELLS	DISTRIBUTOR
AGREED- PHILLIP K. KAZER	AGREED- LISA A. KRUPP
EXECUTIVE V P SALES & MARKETING	MIKE-SELL'S DISTRIBUTOR



Frost Brown Todd LLC
ATTORNEYS

Jennifer R. Asbrock
Member
502.779.8630 (t)
502.581.1087 (f)
jasbrock@fbtlaw.com

March 13, 2017

Via Electronic Mail @ www.nlrb.gov

Jodi A. Suber, Field Examiner
National Labor Relations Board, Region 9
550 Main Street, Room 3003
Cincinnati, Ohio 45202-3271

Re: Mike-sell's Potato Chip Company
Charge No. 09-CA-184215

Dear Ms. Suber:

This letter sets forth the position of Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") regarding any injunctive relief sought under Section 10(j) of the National Labor Relations Act ("Act") in relation to the above-referenced unfair labor practice charge filed by IBT Local Union No. 957 ("Union").[1] The Union's charge asserts that Mike-sell's violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act by declining to bargain with the Union over the decision to sell four delivery routes to independent distributors and by declining to produce certain information requested by the Union in connection with its request for decisional bargaining. Because the allegations in this case do not satisfy the applicable legal standard, the Regional Director has no justification to seek a Section 10(j) injunction.

The controlling precedent in the Sixth Circuit is set forth in *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 212 (6th Cir. 1995). To award injunctive relief under Section 10(j), a district court must find "reasonable cause" to believe the alleged unfair labor practice has occurred, and the court must further find injunctive relief to be "just and proper." *Id.* (citing *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1224–25 (6th Cir.1993)). If the district court is unable to make either of these findings, the petition for injunctive relief must be denied. *Id.* (citing *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir.1988)).

[1] Mike-sell's submits this position statement in an effort to achieve informal administrative resolution of this unfair labor practice charge. In submitting this position statement, the Company does not intend to waive any defenses it may have or in any way prejudice itself with respect to any procedural or substantive issue.

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ATTACHMENT
5

The "reasonable cause" element requires the Regional Director to produce evidence in support of a theory of liability that is "substantial and not frivolous." *Id.* The "just and proper" inquiry focuses on "whether [injunctive] relief is necessary to return the parties to [the] *status quo* pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving [the] *status quo* is possible." *Id.* at 214 (internal quotations and citations omitted). Section 10(j) proceedings "are merely ancillary to unfair labor practice proceedings to be conducted before the Board," so the primary purpose of Section 10(j) is "to give the Board a means of preserving the *status quo* pending completion of its regular procedures," which might be ineffective if immediate relief cannot be granted. *Id.* at 212, 214 (internal quotations and citations omitted).

In *Automatic Sprinkler*, the Sixth Circuit upheld the district court's decision to deny a 10(j) injunction. *Id.* at 209, 215. The Board established "reasonable cause" for the injunction based on the employer's internal subcontracting plan, which confirmed its goals to "avoid being a signatory to any union contract, pay its demands and work rules," to "eliminate labor negotiations," to "eliminate costs associated with union grievances," and to reduce "administration costs associated with union labor."[2] *Id.* at 213. The Board showed the subcontracting decision was a mandatory subject of bargaining because (1) the company substituted subcontractors' employees for its own; (2) the company continued to install and maintain sprinklers; and (3) the local unions had great control over labor costs, which was the stated basis for subcontracting. *Id.* The Board also showed the employer did not bargain in good faith because the company failed to meet with half of the affected local unions before its decision was implemented, thus presenting the local unions with *a fait accompli*. *Id.*

Despite showing "reasonable cause," the Board in *Automatic Sprinkler* failed to prove injunctive relief was "just and proper." The Sixth Circuit agreed with the district court that the injunction sought was "too broad, would result in undue financial hardship to the Company, and is not necessary to preserve the ultimate remedial authority of the Board." *Id.* at 214. The employer sustained serious financial losses by using its employees for sprinkler installations, so the company had already subcontracted all installation work and sold all related tools, vehicles, equipment, and materials. *Id.* at 215. Reinstating the *status quo ante* would force the company to (among other things) buy back or re-lease installation tools, vehicles, equipment, and materials, as well as re-hire administrative staff to schedule and coordinate installations. *Id.* The Sixth Circuit rejected the Board's argument that injunctive relief was "necessary to prevent employees from 'scattering to the four winds' immediately," as the labor agreements themselves allowed the company to subcontract with other unionized businesses with whom unit members could obtain employment. *Id.* While recognizing that local unions could be weakened if the employer subcontracted with more non-union entities, this harm was "too speculative to conclude

[2] Moreover, the employer's president and CEO repeatedly expressed a desire to convert the company into a non-union business. *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 213 (6th Cir. 1995).

that Board relief following unfair labor practice proceedings would be ineffective without injunctive relief." *Id.*

Here, an even stronger case exists for denying interim injunctive relief. The Union's allegations provide no "reasonable cause" to warrant this extraordinary remedy, as the Regional Director does not advance a substantial theory of liability. Unlike in *Automatic Sprinkler*, Mike-sell's made no discriminatory remarks nor made plans to rid its business of Union workers. Moreover, the sale of routes cannot be viewed as subcontracting because—as Arbitrator Paolucci recognized—Mike-sell's "transferr[ed] the expense and the potential revenue to a third party," thereby "removing the risk and reward from its purview." (Exhibit A – Paolucci Award, p. 17 (emphasis in original).) Hence, "[i]n losing control of the business [unit], and the business decisions, the Company has reduced its involvement to that of a supplier." (Exhibit A – Paolucci Award, p. 17.) Mike-sell's did not unilaterally alter any contract or past practice, as its decision to sell sales territory to independent distributors to effect a change in distribution methods was consistent with the parties' past practice, the Expired Contract, the Revised Final Offer, and the Paolucci Award (which the Union never sought to vacate).[3] (*See* 11/4/16 Position Statement.) The Regional Director has long insisted the Expired Contract remains in effect, as seen in compliance proceedings for Charge No. 09-CA-094143. It would be absurd for the Regional Director to advocate for reimplementation of the Expired Contract as to Charge No. 09-CA-094143, while ignoring the Route Bidding Article of that same Expired Contract in this case.[4]

Even if the Regional Director could show "reasonable cause," injunctive relief would not be "just and proper." Just as in *Automatic Sprinkler*, a 10(j) injunction would result in undue financial hardship to Mike-sell's by interfering with (and/or causing breach of) its contractual relationships with independent distributors; and requiring re-acquisition of delivery vans, hand-held scanners, and other distribution tools and equipment of which has already been disposed. There is no evidence to suggest that, in the absence of an interim injunction, the Board could not award full and effective relief under the Act at the conclusion of its regular proceedings. Accordingly, a Section 10(j) injunction would not be appropriate. *See, e.g., Levine v. C & W Mining Co.*, 610 F.2d 432, 438 (6th Cir. 1979)

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[3] Mike-sell's has been in business for over a century, but significant financial losses have forced the Company to rethink its business model. One of the Company's key strategic objectives is to focus more on manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability. In contrast, Mike-sell's is not interested in growing the direct sales distribution side of its business, which has lost money hand-over-fist for years. The Company has gradually reduced its direct sales distribution by selling certain sales territories to independent distributors who then purchase the products up-front, directly from Mike-sell's—thereby accepting the entire risk of loss—and who pay for the exclusive right to re-sell those products as they see fit to retail and wholesale customers within their purchased sales area(s). The Company's unilateral right to change distribution methods by selling its sales territory to independent distributors was confirmed in 2012 by an arbitration award issued by Arbitrator Paolucci, which relied on the "Route Bidding" Article of the Expired Contract and further recognized that employers have the inherent right to determine the type of business they are in as well as the manner in which they conduct it. (Exhibit A – Paolucci Award, pp. 16-21.) Regardless of whether the Expired Contract or the Revised Final Offer was in place when the four sales territories were sold, the Paolucci Award applies to both sets of terms in the same manner because they contain substantively indistinct Route Bidding provisions. (*Compare* Exhibit B – Expired Contract, pp. 15-17 *with* Exhibit C – Revised Final Offer, pp. 8-9.)

[4] As explained by its compliance filings in Charge No. 09-CA-094143, Mike-sell's disagrees with the assertion that the Expired Contract is in effect. But whether the Expired Contract or the Revised Final Offer is ultimately applicable, the result in this case would be the same. (*Compare* Exhibit B – Expired Contract, pp. 15-17 *with* Exhibit C – Revised Final Offer, pp. 8-9.)

(vacating injunctive provisions prohibiting employer from advertising for sale or selling its trucks, as well as those provisions requiring employer to bargain with union over sale of its trucks, and recognizing that "whether an employer is required to negotiate with a union on a decision to discontinue operations or subcontract work, as opposed to the effects of such a move . . . is to be decided on the facts of each case") (citing cases).

I trust this position statement adequately responds to your inquiries. Please do not hesitate to contact me if you have other questions or need additional information.

Sincerely,

Jennifer R. Asbrock

Enclosures

IN THE MATTER

OF

ARBITRATION

BETWEEN

MIKE SELLS POTATO CHIP COMPANY OF DAYTON, OHIO

AND

TEAMSTERS
LOCAL NO. 957

Grievances:	Angie Watson; Route Elimination
Date of Hearing:	June 27, 2012
Location:	Thompson Hine Dayton Law Offices
Case No:	121212-51687-6
Date of Award:	September 26, 2012

Finding: The Grievance is denied.

Union Representative:

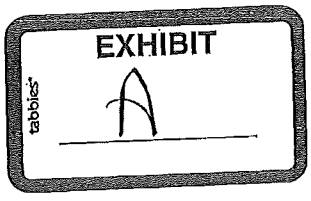
John R. Doll
Doll, Jansen, Ford & Rakay
111 W. First Street, Suite 1100
Dayton, Ohio 45402-1156

Employer Representative:

Jennifer Asbrock
Thompson Hine
Austin Landing I
10050 Innovation Drive
Suite 400
Dayton, Ohio 45342-4934

OPINION AND AWARD

Michael Paolucci
Arbitrator



Administration

By letter dated December 27, 2011, from John R. Doll, the Union's Attorney, the undersigned was informed of his designation to serve as arbitrator in an arbitration procedure between the Parties. On June 27, 2012, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of post-hearing briefs from both Parties, and the matter is now ready for final resolution.

Grievance and Question to be Resolved

The following Grievance (Joint Exhibit – 2) was filed on November 9, 2011, and is the pertinent subject matter of this dispute.

* * *

> **GRIEVANCE:** (give dates) This grievance is being filed by the Local on behalf of the Sales employees of Mike-Sells Potato Chip Company of Dayton, Ohio under Article I, Article II and Article VIII of the Collective Bargaining Agreement. The Company has stated to employee Angie Watson that her route will be transferred to an independent operator. The Company is in violation of Articles I, II and VIII of The Collective Bargaining Agreement. I request that the Company bargain over the decision to transfer this route and work to an independent operator and the effects of the decision prior to taking any action. Further facts to be presented at hearing.

* * *

The questions to be resolved are whether the Company violated the Agreement when it sold the Grievant's route to a third party, who then began performing the work that had been done by the Grievant; and if so, what should the remedy be?

Cited Portions of the Agreement

The following portions of the Parties' Collective Bargaining Agreement (Joint Exhibit – 1), hereinafter "Agreement", were cited:

* * *

ARTICLE 1
RECOGNITION – UNION MEMBERSHIP

Section 1 The Company agrees to recognize and hereby does recognize the Union, its designated agents and representatives, its representative successors and/or assigns, as the sole and exclusive bargaining agent on behalf of all the employees of the Company in the following described bargaining unit: all Sales Drivers, and Extra Sales Drivers at the Company's Dayton Plant, Sales Division, and at the Company's Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road Drivers employed by the Company, but excluding all supervisors, security guards, and office clerical employees employed by the Company.

ARTICLE II
UNION MEMBERSHIP AND SECURITY

Section 1 The Employer agrees that as a condition of employment, on or after the thirtieth (30th) day following the beginning of such employment or the effective date of the Agreement, whichever is later, all employees in the bargaining unit covered by this Agreement shall become and/or remain members of the Union within the limitations and subject to the conditions set forth in Section 8(a)(3) of the National Labor Relations Act, as heretofore or hereafter amended.

Section 2 The Company agrees that when it needs additional employees in the bargaining unit, it shall make a reasonable attempt to contact the Union in order to obtain additional employees to fill such positions. However, the Company shall not be required to hire those individuals referred by the Union.

* * *

ARTICLE VIII
SENIORITY

Section 1 Seniority is defined as the length of an employee's most recent period of service with the Company beginning with the last day the employee

began work as a full-time bargaining unit employee of the Company. Seniority shall be the basis for all worked covered by this Agreement.

Section 2 An employee shall be considered to be on probation and shall not be entitled to any seniority rights until said employee has been continuously employed by the Company for a period of sixty (60) days.

* * *

ARTICLE VIII-B
ROUTE BIDDING
* * *

Section 5 In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

* * *

ARTICLE XIX
MANAGEMENTS RIGHTS

Section 1. Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplining for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of lack of work or economic reasons, or other reasons beyond the control of the Company, the right to improve manufacturing methods, operations and conditions and distribution of its products, the right to maintain discipline and efficiency of employees is exclusively reserved to the Company. It is understood however, that this authority shall not be used by the Company for the purpose of discrimination against any employee because of their membership in the Union, and that no provision of this paragraph shall in any way interfere with, abrogate or be in conflict with any rights conferred upon the Union or its members by any other clause contained in this Agreement, all of which are subject to the grievance procedure.

* * *
* * *

Factual Background

The Company is a manufacturer of snack foods, is headquartered in Dayton, Ohio, and has two (2) production facilities – one in Dayton, Ohio and the second in Indianapolis, Indiana. In addition, it operates a distribution center in Columbus, Ohio, also referenced as the Columbus Distribution Center. The Company's "Route Sales Drivers", among other employees, are represented by the Union. The Grievant, prior to resigning because of being transferred, had worked for the Company since March 28, 1994, or approximately eighteen (18) years.

The dispute involves the Company's sale of the work that the Grievant performed to an independent third party. There was some dispute as to the proper terminology to use with regard to the third party and the transaction that had taken place. The Grievance, and thereby the Union, referred to the work as being subcontracted to an independent operator. The Company objected and claimed that the route was "sold" to an independent distributor. There was no real dispute as to what occurred, and so the proper terminology will be considered as the case is discussed.

The Company distributes its products throughout Ohio, Indiana, Kentucky, Illinois, and Michigan. It distributes the product in two (2) methods – through its employees in the position of Route Sales Drivers (hereinafter "RSD's"), and through independent distributors. It has about eighty (80) RSD's and over one hundred (100) Independent Distributors. It also uses three (3) over the road drivers who make larger deliveries to warehouses, stand-alone storage bins, and distribution centers. These employees are not part of the dispute and will not be discussed further. The storage bins are used as a drop point for product where over the road drivers will leave product, and where RSD's will pick up product for servicing their route. In this way the

storage bins act as mini-distribution centers and allow the RSD's to pick up their product nearer to their route than if the distribution centers were used.

RSD's are responsible for loading their trucks; traveling to customer locations; stocking shelves; doing point-of-sale marketing, increasing sales, rotating unsold product, and removing expired product from shelves. The Company introduced evidence that the competition in the snack food industry has begun to put pressure on it to become more efficient to remain profitable. It argued that the larger companies (e.g. Frito-Lay) are dominating, and are squeezing smaller companies that do not change with consumer demand. The expectations in the industry are for manufacturers to continue producing fresher products, but at lower prices. To remain competitive the Company is focused on reducing costs since it has been difficult to solely rely on higher sales volumes.

One method of remaining competitive is for the Company to change distribution methods from direct store delivery to independent distribution – especially for outlying sales routes. The outlying routes are farther from the distribution centers and therefore have extra costs for remote RSD's, storage bins, and over-the-road drivers to service the bins. These extra costs sometimes cause outlying routes to become unprofitable since the extra costs do not support ongoing direct sales. The Company showed that when a route becomes unprofitable it will first attempt to increase profitability before eliminating it. As an example, the Company' Zone Sales Manager testified that special promotions will be offered, routes are restructured to improve efficiency, and it will enter partnerships with other businesses. In addition, the Company will send managers into the field to attempt to solicit new business from more stops, and thereby increase sales.

However, when the route becomes untenable the Company will sell the route to a third party - or independent distributor. In this way the risk is shifted to the third party, and the unprofitable route is turned around. The Company claimed that it has made this type of unilateral decision before, and it has become routine for the Columbus Distribution Center. It presented evidence that in the past when a route has been sold to a third party, the RSD who is displaced because of the elimination of his/her route is offered the opportunity to bump into other routes within the Columbus Distribution Center. The Company claims that this is directly addressed in Article VIII-B of the Agreement, and argues that there is no dispute that the Company has the right to unilaterally create and eliminate sales routes – as it did here.

The Company showed that the third party that purchases a route will take on the risk by choosing the specific product to be marketed, by determining the amount of each product to be marketed, by purchasing the product directly from the Company, and through promoting and re-selling the products to earn the cost back. It cited specific instances where routes were sold and then eliminated, as follows:

- In early 2009 the Mansfield, Ohio route was sold to Snyder's of Berlin. The displaced driver, Nancy Higginsbothom was offered the opportunity to bump into the Columbus Distribution Center, but she chose to resign. The Union was notified of the decision, and no objection was made.

- In late 2009 the Company sold two (2) routes – Newark/Granville/Zanesville and Lancaster/Hocking Hills/Athens to Ohio Citrus. One displaced driver, Patrick Kenny, bumped into the Columbus Distribution Center. The other displaced driver, Jim Philippi, was offered the opportunity to bump but resigned. Again, the Union was notified, but did not object.

- In late 2010, Ohio Citrus gave up the two (2) routes it had bought. The Newark/Granville/Zanesville route was brought back in-house and worked by Ron Page, but the Lancaster/Hocking Hills/Athens route was sold to Snyder's. The Union was notified and did not object.

- In June 2011, Snyder's returned the Lancaster/Hocking Hills/Athens route. Since the Company determined that it could not afford to service the route, it was largely

abandoned. The Lancaster portion was added to the new Lexington route that was already covered by in-house Route Sales Drivers. The Union was notified, and did not object.

- In August 2011, the Company sold the Lancaster/New Lexington route and the Newark/Granville/Zanesville route to Buckeye Distributing. Each of the displaced drivers bumped into the Columbus Distribution Center. The Union was notified, and did not object.

This case does not differ much from those cited. Historically, when the Grievant started with the Company she commuted to the Columbus Distribution Center – according to her it was a 136 mile round trip. In order to service the route the Grievant would travel to Columbus twice per week. Ordinarily RSD's are not permitted to take their delivery trucks home. To adapt to the Grievant's commute, the Company permitted her to keep her truck at her residence since she would otherwise have to drive the truck back and forth to service the route each day. The Union pointed out that except for the twice per week travel to Columbus, the Grievant did not have much contact with the Columbus Distribution Center.

Sometime around 1998 (the Company claimed it was in 2000, the correct date is immaterial) the Company began to use a storage bin in Mansfield, Ohio. This allowed the Grievant and other RSD's to drive to Mansfield to pick up their product, instead of commuting to Columbus. The Union cited the fact that once the Company began the Mansfield bin, the Grievant was able to establish another route in the Mansfield area. Another employee was assigned the Mansfield route, and the Grievant continued on the Marion route.

However, Mansfield was still an eighty (80) mile commute for the Grievant, and sometime between 2006 and 2007 the Company opened a storage bin in Marion, Ohio so that the distance for the Grievant's route was that much closer. The Mansfield RSD used the Marion bin for his deliveries. The Union cited different actions the Grievant took as evidence of her worth

as an employee. The Company did not dispute that the Grievant, on her own initiative, shoveled snow, and kept the warehouse clean, so that she and other RSD's could more easily access the warehouse. Additionally, the Union cited the increased sales volume that the Grievant was able to achieve in her tenure. It claimed that her success caused the Company to conclude that the volume of the route became too large and her route was cut. The Grievant increased sales volume again. It claimed that in the late summer 2011, the Company removed some accounts from the route and contracted them, without the Grievant's knowledge, to a distributor in West Central, Ohio.

At some point in 2011 the Company determined that the Grievant's route was not profitable, and that despite its efforts to make it more profitable it was not going to succeed. Therefore, it was determined that the route was to be sold. In late October 2011, the Grievant attended a meeting with Sharon Willie, the Company's Director of Human Resources, and Mark Plumber, the Company's Zone Sales Manager. The Union representative was Harry Donnell, the Columbus Distribution Center's Union Steward. The Union's Business Representative, Mike Maddy, was not present. The Grievant was informed that her route was being sold, and that it was to occur in the next three (3) to four (4) weeks. A few days later, the Grievant contacted Maddy to inform him as to what was happening.

In November 2011 the Company sold the Marion route to Buckeye Distributing. The Company had taken efforts over the years to make the route more profitable, and the Grievant confirmed that such efforts had been made during her tenure. By October 2011 the Company concluded that it was losing over $1,100.00 per week on the route, and that such was largely due to the costs of the storage bins and the over-the-road drivers used to deliver product to, what it considered, a remote area of the Columbus Distribution Center territory.

As in other similar situations, the Grievant was given the opportunity to bump into the Columbus Distribution Center. The Grievant initially selected the Grove City route. Because of her seniority she could have bumped any other driver in the center, except one. The Company showed that the Grievant's sales commissions were basically the same for the Grove City route as it had been for her Marion route, and that she actually earned a little more during her short tenure in that position (Company Exhibit – 1). The Company showed, and the Grievant admitted, that there were other routes she could have chosen which would have earned her between $400 and $1,000 more per week. It was not explained why she did not choose these routes.

Since the Grievant continued to live in Marion, Ohio, she became upset that she had to commute to Columbus to pick up her product to be delivered to the Grove City area. The Company pointed out that this was the same commute that the Grievant had made during her first six (6) years of employment. Ultimately the Union filed a Grievance claiming that the failure to bargain over the sale of the Marion route violated the Agreement. The Grievant ultimately resigned after about three (3) weeks, claiming she was losing too much money commuting to Columbus. She testified that she was spending half her paycheck on fuel costs. The Grievant got a job delivering for Nichols Bakery. The matter was processed through the steps of the Grievance Procedure and ultimately was appealed to arbitration hereunder.

Contention of the Parties

Union Contentions

The Union describes the dispute as a straightforward subcontracting issue, and it cites arbitral authority in support of its claim that the Company improperly relied on its management rights to transfer the work. It contends that subcontracting is limited by implication in a

collective bargaining agreement, and to find otherwise would render such agreement meaningless. It argues that bad faith on the part of management is not a necessary element of its case, and claims that a company subcontracting must act reasonably. It thus claims that the silence in an agreement does not mean that subcontracting is permitted. It asserts that the implied terms of the Agreement prohibit the subcontracting that occurred here.

The Union claims that there is no factual dispute that what occurred here was the reduction of one bargaining unit position caused by the elimination and transfer of the Marion route. It rejects the position of the Company that the management rights provision allows it to eliminate the route since, followed to its logical end, the result would mean that the Company could eliminate all RSD's and all of their routes by simply subcontracting the work. It contends that this position has been rejected by arbitral authority under long-standing principles. It cites said authority for the proposition that subcontracting out work is not permitted when such is done for the sole purpose of saving on labor costs, or reduced expenses, absent clear contractual authority.

The Union asserts that the decision to transfer the work was not done to "improve manufacturing, methods, operations and conditions in distribution of its products" but instead was simply done based on cost. It argues that this is in conflict with the expectations implicit in the Agreement. It asserts that even if the route was unprofitable, then the Agreement contemplates that the Company could either eliminate the route, or merge it with another. It claims that the Company went outside the Agreement by subcontracting a third party to address the issue. It claims that the result, if the Company were to succeed here, could mean a complete transfer of the work to third parties with all bargaining unit positions being eliminated.

The Union rejects the claim that a binding past practice existed with regard to the custom of eliminating a route and then bumping the affected employee. Although it concedes that similar situations had occurred, it asserts that the Company did not establish that the action had taken place throughout the Company at all of its locations where employees were represented by the Union. It argues that even if past employees did not want to challenge the Company's actions, such does not establish a well-accepted practice binding on the Union. It claims that the incidents were insufficient by themselves, and were especially weak as binding practices since they were not proven to have been communicated to an executive with the Union. Since the Union officials did not know, and were not proven to have known of the practice, then it argues it was not binding.

The Union asserts that since neither Mr. Maddy, nor any other Union official was ever notified that the Company was removing bargaining unit employees from their routes and subcontracting the work, then it argues that it could not prove that the activity was "accepted" as a past practice. Citing arbitral authority, it claims that this essential element makes the past practice claim of the Company without merit.

For all these reasons, it asks that the Grievance be sustained; that a cease and desist order be made; that the Grievant be made whole and that any other remedy believed appropriate by the undersigned be made.

Company Contentions

The Company contends that the Union could not sustain its burden of proving that a violation of the Agreement occurred. It argues that the Agreement is silent as to the right of the Company to change distribution methods, or about entering relationships with independent

distributors. Since there is nothing that precludes the Company from eliminating sales routes, and since there is an express right of employees whose routes are eliminated to bump into another route, then it asserts that the Parties contemplated the right of the Company to subcontract work as it did here. It cites the management rights clause as explicitly giving the Company the right to determine route efficiencies, and contends that the Company has relied on this language to consistently sell outlying routes, and eliminate those routes for the affected RSD's.

The Company claims that the Union is acting unfairly since each time the Company has eliminated a route it has notified the local Union Steward, who has never objected. It rejects any claim of the Union that notification to the Union Steward is insufficient, and contends that there is no authority that would support this claim. It argues that the Union's case does not rely on any part of the contract, and instead attempts to claim that the Grievant was a good employee who deserved better treatment. It asserts that since the uncontested facts show that *despite* her good work habits and *despite* her relatively good sales volume, the route was still losing $1,100.00 per week, then its decision was economically justified. It thus contends that the ancillary facts regarding the Grievant's relatively good work habits are irrelevant to the question of whether the Company has the right to control distribution methods and improve operations and efficiency.

The Company rejects this case as a straightforward subcontracting case since the independent distributors are not paid by the Company to deliver predetermined amounts of product to predetermined customers and locations on behalf of the Company. Since the independent distributors purchase the product from the Company, pay for the route, and own the exclusive right to distribute Company products, it argues that the issue is more complicated than just a subcontracting case. Since the distributor takes on the entire risk of loss for the product,

plus other administrative overhead expenses, and essentially runs a separate business, then it argues that it is distinguishable. Since this is not a subcontracting relationship, then it argues that the Union's argument on this point is misplaced.

It cites arbitral authority for the proposition that changing distribution methods from direct sales delivery to independent distribution is not the functional equivalent of subcontracting work that would otherwise be performed by bargaining unit employees. It cites specific findings where an employer "is essentially getting out of the distribution business when it sells its assets" through independent distributors. It contends that although the decision affected certain bargaining members, the underlying purpose was to change the method of distribution where the decision on delivery to customers was made by the third party. Since the primary purpose of the transaction was to remove an unprofitable area of its business, then it argues that the negative impact to the bargaining unit was tangential. Since nothing in the Agreement prevents the Company from taking this action, it argues that no violation could be proven.

The Company asserts that even if it were a normal subcontracting case, the Union could still not sustain its burden. It asserts that since the Union has not cited a specific provision, then reasonableness and good faith are the appropriate standard. It cites arbitral authority for elements to consider whether such reasonableness and good faith were proven, and it contends that the Company's practice of selling and eliminating non-profitable, outlying routes shows both a past practice and a justification. It argues that the cost-benefit of the action is sufficient reason to subcontract under cited authority, and it asserts that any employer that does not take efforts to control costs will soon find itself closing its doors. Even if the past practice does not provide an independent reason for the Company's action, it argues that it proves that the decision was reasonable and not a violation of the Agreement.

The Company also cites other factors supporting its claim that a subcontracting violation did not occur. Since the change in the routes had a *de minimus* impact to the bargaining unit, then it argues that the subcontracting was not inherently destructive, nor did it reflect a discriminatory motive on the part of management. Since it proved that the actions were based on financial considerations, which the Union did not challenge, it argues that it proved its good faith and reasonableness.

The Company also contends that although it has maintained some internal control over distribution, its core business is the manufacture and sale of snack foods. It argues strenuously that it is not in the distribution business. It cites the fact that it has over 100 independent distributors, and only 80 RSD's as proof that the core part of its business is manufacturing and selling snack food. It cites authority for the idea that when the "core" business is not affected by subcontracting decisions, they are often permitted as outside the core competency. Indeed, it asserts that it is common in the industry for snack food makers to sell their routes to independent distributors – some use national brokers whose sole business is to assist businesses in buying and selling territories. It argues that if the class of work is frequently performed by independent contractors, then it is unlikely that management's decision to subcontract work is improper.

The Company asserts that it even proved that before making its decision to eliminate the route, it first took steps to make the route more profitable to see if could be made viable. It asserts that this proves a great deal of good faith, and evidence that the Company does not make its decisions on route elimination lightly. It cites the Parties' history for proof that the Union has known about the practice of using independent distributors, but has never filed a grievance, unfair labor practice, or attempted new language which would change the Company's methods. It argues that in this case the Company should be given wide latitude in subcontracting decisions.

For all these reasons, it asks that the Grievance be denied.

Discussion and Findings

A review of the record reveals that the Grievance must be denied. The basis for this finding is that the Union could not sustain its burden of proving that the elimination of the Grievant's route violated the Agreement.

An initial issue was raised as to the appropriate characterization of the Company's action – i.e. was it a subcontracting issue, or a transfer of work to an independent distributor. While at first blush the issue appears arcane, its resolution properly frames the issue, and thus determines the outcome. The Union's position is that the termination of the route, the transfer of the work to a third party independent distributor, and the transfer of the Grievant to the Columbus Distribution Center was an act of "subcontracting." The Company described the series of events as first an economic decision that the route was not profitable, and then a logical business decision to keep as much business as possible while transferring the risk associated with the business to a third party. Its version of events is that it was left with a choice – to proceed as it had in prior similar instances, or to simply end the route. The Company's characterization of the case is thus one of a pure business decision without regard to the impact to the Union, whereas the Union considers it a subcontracting of work from the bargaining unit to a third party solely to save on expenses.

In evaluating these parallel descriptions, it is first fair to conclude that the Union misses much of what has occurred over time with the Company. In a typical subcontracting case the exact work that had been done by bargaining unit personnel is hired out to a third party. This

does not accurately describe what occurred here. A typical subcontracting case involves the transfer of an expense that was once a bargaining unit labor cost to a third party, at a cheaper rate, and with the ability to end the relationship when the work ends. This case involves more than just the simple transfer of work, and thus is not comparable to a typical subcontracting case.

This situation involves the Company transferring the expense *and* the potential revenue to a third party. It took money, and transferred the business enterprise to a third party. This must be recognized as different from a dispute where saving money is the sole consideration. Instead of just this one motivating factor, the Company was removing the risk and reward from its purview, and selling it to a third party. Because there are more factors involved than a normal subcontracting case, it would be unreasonable to classify it as a classic subcontracting case.

Also wrong is the Union's claim that the Company did this simply because the costs were too high. This type of argument is typically applied when the costs of labor compared to the costs of the subcontractor can be easily analyzed. Welding work by bargaining unit employees is the labor cost plus the costs of materials. If a subcontractor does it for less, expenses are reduced. As in other subcontracting cases, a pretty simple calculation is all that is required to see how the change will affect the bottom line.

The difference in a case where an entire business unit is transferred is that the impact to net profit of the entire company is harder to determine. In losing control of the business, and the business decisions, the Company has reduced its involvement to that of a supplier. The remaining part of the enterprise, both the upside and the down, is up to a third party. It must be recognized that this is much different than a straightforward comparison of subcontracted work versus bargaining unit work. Where an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of the cost savings. The business

decision must necessarily involve a calculation of the cost savings and the return on investment, and the net impact to the profitability of the entire company. In this situation the Union's position loses credibility since there is more to consider than just cost savings.

In this case the Company was able to prove that the route was not profitable and that the loss was ongoing. It showed that the route was unprofitable, and that there was a revenue stream that could be directly attributable to the amount of product sold. Thus, independent of the rest of the business, the Company could determine whether a route was profitable, and whether there was a return on the cost of keeping the route. This must be recognized as a distinguishing factor from the Union's cited authority, and thus from the arguments made based on a typical subcontracting analysis.

Indeed, the impact is helpful in following the logical result if the Union were to prevail. If the Grievance were found to have merit, the Company would have a situation where it would be forced, by contract, to continue a business activity that loses money every day. Each time it sells a product on the Grievant's route, through a RSD, more money is lost. This losing proposition, if forced, would logically lead to a situation where the Company is forced to keep non-performing assets (in the form of a route) because the Agreement is found to require it. This outcome is unreasonable, and, absent specific, clear language, would be difficult to support as being the intent of the Parties.

Moreover, as persuasively argued by the Company, the authority on this subject often considers the fact that the purpose of the change in method is to change the business methods altogether. Where an employer replaces precise bargaining unit work with a subcontractor doing the exact thing, it will more likely follow a traditional subcontracting analysis. However, where a company chooses a whole new method of doing its business, and where the third party is doing

the work differently, a different analysis is required. In this case, the third party is buying company product. How they deliver, how much they deliver, which customers are chosen, and which products are sold are all the choice of the third party. The Company loses all control of the route, unlike a normal subcontracting case where the Company maintains complete control of the vendor – and could even argue that work was not done correctly and refuse to pay. In contrast, here the independent distributor buys product, and the Company has essentially no control over what happens next.

All of the foregoing requires that this case be characterized as something other than a subcontracting case. The Company has chosen a different manner of operating its business, and the work that is lost is not because of subcontracting, but because of the different methodology. This conclusion is supported by other factors in the case. The Company showed that its history includes making this type of decision, eliminating the route, and allowing the affected employee to bump. Although the Union argued that the business agent did not know of these actions, thus making the practice non-binding, it must be found that this claim is without merit. It is difficult to understand what else the Company was supposed to do as far as notice to the Union. There is no contractual provision that was cited that would require the business agent's involvement before actions are more influential (as past practices or otherwise), and it was not disputed that the local Union Steward was notified of the actions, without objection. As a result, it must be found that the fact that the Company has done this for some time, without objection of the Union, proved that the Parties have accepted it as a normal method of selling routes.

To find otherwise would mean that the Company would have to second guess every communication it had with the Union Steward. It is incumbent upon the Union Steward to communicate with his executives, and it is not reasonable to expect the Company to have to

worry about whether all of its discussions were with the appropriate Union official. Why else have a Union Steward present and available? The Company thus proved that it communicated with the Union; that it had engaged in this practice without complaint; and that it had done so based on business needs.

Absent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company. The language that the Union cites, where the Parties contemplated situations where it "becomes necessary to eliminate a route or combine one route with another" in Article VIII-B, must be found as supportive of this decision. The "elimination" of a route is fairly interpreted as either being elimination due to the ending *or* selling of a route. It would not be logical to only make the language applicable to a situation where the Company determines that the lack of profitability only necessitates the complete withdrawal from a market. The elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control. This broader meaning is justified based on the Company's business practices as currently configured. Since it has over 100 distribution partners and only 80 RSD's, then it follows that the Parties intended the elimination provision to cover all transfers of the work from the bargaining unit member to a third party, or to the ending of the work, while the other part of the provision covers other situations where the work is merged with another route.

To find otherwise would mean that the Parties knew enough to address situations where a route was ended completely when the Company would withdraw from a market; and they knew enough to address situations when routes were merged; but that they lacked enough foresight to understand that routes could be sold and a route could be eliminated in that fashion. This does

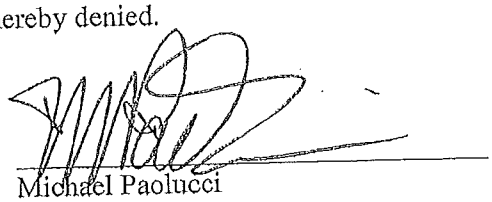
not follow since the Company has had third party distributors as part of the business for some time. It is a more reasonable interpretation that they intended the two (2) instances in the provision – i.e. "elimination" or "merger" to cover all expected situations.

Based on the foregoing, it must be found that the language supports the analysis above, and expressly addresses the situation of the Grievant. Her work was eliminated through the sale of the route, and she was given the opportunity to bump. Her work was not subcontracted, it was unprofitable and the business was sold to a third party. Based on this analysis, it must be found that the Company did not violate the Agreement.

For all these reasons, the Grievance must be, and is, denied.

Award

The Grievance is hereby denied.



September 26, 2012
Cincinnati, Ohio

Michael Paolucci

AGREEMENT

BETWEEN

MIKE-SELL'S POTATO CHIP COMPANY OF DAYTON, OHIO

Sales / OTR

AND

TEAMSTERS LOCAL UNION NO. 957

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES

AND SERVICE AND CASINO EMPLOYEES

Effective November 17, 2008 Expiration November 17, 2012

EXHIBIT B

tabbies

Section 4 above, and the Sales Driver or Extra Sales Driver is also transferred, said Sales Driver or Extra Sales Driver shall carry his seniority with him into the new section and his seniority shall be terminated in his prior section for vacation selection purposes only.

ARTICLE VIII-A
LAYOFF AND RECALL

Section 1 In the event that it becomes necessary to reduce the number of employees because of a reduction in force, employees having seniority shall be retained, and employees having the least seniority shall be laid off. Probationary employees without seniority shall be the first to be laid off.

Section 2 Recall of employees shall be on the same basis of seniority. The Company shall notify an employee of his recall by registered letter to his last known address. An employee so notified shall inform the Company of his intent to accept said recall within three (3) days of the receipt of the recall letter. Any employee so recalled and who notifies the Company of his intention to return to work shall return to work not later than eight (8) days after receipt of his recall notice. Any employee so recalled who does not report within eight (8) days after receipt of his recall notice shall be presume to have voluntarily quit and shall lose all seniority.

Section 3 No employee shall lose his or her seniority by reason of a temporary cessation of employment due to layoff if he or she is recalled to return to work within twelve (12) months, provided said employee reports for work when notified to do so, but in no event, not later than eight (8) days after receipt of notice to return to work after a period of layoff.

Section 4 In the event any employee returning to work within the time limit set forth in this Article is physically unable to resume the former or similar duties of the job from which said employee was laid off, the employee shall be given consideration for any other work that is available.

ARTICLE VIII-B
ROUTE BIDDING

Section 1 In the event a route becomes open for any reason, and in the event any new routes are created, the Company shall post a notice when a route actually becomes open or created. The posting of an open or newly created route shall remain posted for five (5) working days. The job posting

for a sales route shall include the boundaries and territory covered by the route, a listing of the stops currently on said route, and the average weekly gross sales of said route based on the previous 52 weeks of sales.
With regard to sales routes, all Sales Drivers and Extra Sales Drivers shall have the opportunity to bid for such sales route and the most senior Sales Driver or Extra Sales Driver bidding on said posted sales route shall receive the bid. In the event that no Sales Driver or Extra Sales Driver bids on such route, the Company shall have the right to assign junior skipper per groups established in Article 8, Section 4, to that route without loss of bidding rights. The local union business agent will be copied on all job bids posted.

Section 1 (B) With regards to new super stores such as Cubs, Meijer's, Biggs, etc., or others with similar characteristics, it is understood that the Company will have the exclusive right to assign as deemed appropriate. All other accounts opening within territories and boundaries of a route should be assigned to salesman on that route. It is agreed that routes assigned a new super store will be subject to an up-front adjustment, concurrent with the assignment of the new account and a final adjustment eight (8) to twenty (20) weeks after receiving the new account. The final adjustment will not reduce any route below its twenty-six (26) week sales average, excluding promotional weeks, established prior to receiving the new account or $5,000.00 whichever is greater.

Section 2 In the event the filling of an opening or newly created route creates an opening in another route, said route opening shall also be filled according to the provisions of Section 1 of this Article. The third and fourth opening thus created shall also be filled by the provisions contained in Section 1 of this Article. Any other opening shall be filled by Company assignment.

Section 3 Any Sales Driver or Extra Sales Driver making a switch in routes as a result of bidding on an open or newly created route shall not have the right to bid on any future route openings for a period of twelve (12) months unless such Sales Driver's or Extra Sales Driver's route is eliminated. Twelve months begin at the time of bid.

Section 4 When an existing route becomes open, the Company shall not split the route by more than ten percent (10%) for bidding purposes unless by mutual agreement with the Union. Bids must truly reflect the stops on the route bid after cut. No route will be cut below $4,000.

Section 5 In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to

displace a less senior employee. However, displacements shall be restricted to the employees' service location.

Section 6 Sales Drivers and Extra Sales Drivers shall have the right to bid on route openings or newly created routes on a Company-wide basis by seniority, and in the event of a transfer of said employee from one section to another, said employee shall carry his or her respective seniority from one section to the other.

ARTICLE IX
FUNERAL LEAVE

Section 1 In the event of the death of a mother, father, foster mother, foster father, "active" step-parents, mother-in-law, father-in-law, spouse, brother, sister, child, step-child, grandchild of an employee, grandparent of employee or employee's spouse, the employee shall be granted a leave of absence from the day of death to, and including, the day of funeral; said leave, in no event, shall exceed three (3) working days, except in the case of the death of a grandparent of an employee or employee's spouse, the employee will be granted a leave of absence for one (1) working day. Such paid leave shall be granted to the employee actively at work or scheduled to work when the unfortunate incident occurs and when such employee's absence due thereto would result in a loss of pay if the benefit set forth herein were not in effect.

Section 2 Employees who are laid off, on vacation, off work sick or not actively at work for any other reason shall not be eligible for any of the benefits set forth in Section 1 of this Article.

Section 3 The Sales Driver or Extra Sales Driver assigned to a route shall receive commissions during the leave of absence granted under this Article; however, the Extra Sales Driver or any other employee covered by this Agreement operating a route during the leave of absence granted under this Article shall not receive commission from the sales of the route so operated during such leave of absence.

Section 4 In the event a Sales Driver or Extra Sales Driver is off of work because of a death of a relative other than those listed in Section 1 of this Article, the Company shall make every effort to furnish a relief driver for the Sales Driver or Extra Sales Driver. However, the Sales Driver or Extra Sales Driver regularly assigned to the route shall not receive commission for the sales on said route for the day or days of absence relating thereto.

Section 2 Recall of employees shall be on the basis of seniority. The Company shall issue a recall notice by registered letter to the last known address of the Employee. Employees will keep the Company informed of their current address. An employee so notified shall inform the Company of their intent to accept said recall within five (5) calendar days of the receipt of the recall notice. Any employee so recalled and who notifies the Company of their intention to return shall return to work not later than fourteen (14) days after receipt of the recall notice. Any employee so recalled who does not report within fourteen (14) days after receipt of the recall notice shall be presumed to have voluntarily terminated employment and shall lose all seniority.

Section 3 No employee shall lose seniority by reason of a temporary cessation of work due to layoff if they are recalled to work within twelve (12) months, provided the employee actually reports for work when notified to do so, but in no event, not later than fourteen (14) days after receipt of a recall notice is received following the period of layoff.

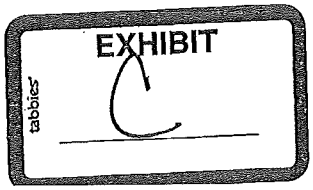
Section 4 In the event an employee returning to work within the time limit set forth in this Article is physically unable to resume the former duties of the job from which the employee was laid off, the employee shall be considered for any other available work for which they are qualified.

ARTICLE 11

ROUTE BIDDING

Section 1 In the event a route comes open for any reason, or if any new routes are created, the Company agrees to review the posting with the Union Steward before posting a notice of the opening and open bidding Company-wide shall be permitted for a period of five (5) working days. The posting shall include the boundaries and territory covered by the route, a listing of the stops currently on said route, and the average weekly net sales of said route based on the previous 52 weeks of sales. The Company will then assign the route to an employee who has bid on the route, based on seniority. In the event that no Sales Driver or Extra Sales Driver bids on a route, the Company shall have the right to assign a junior skipper to that route with no loss of bidding rights.

Section 1 (B) All accounts opening within territories and boundaries of a route should be assigned to the salesperson on that route. It is agreed that routes assigned a new superstore will be subject to an up-front adjustment, concurrent with the assignment of the new route and a final adjustment eight (8) to twenty (20) weeks after receiving the new account. The final adjustment will not reduce any route below its fifty-two (52) week net sales average.



Section 2 Any Sales Driver or Extra Sales Driver making a switch in routes as a result of successfully bidding and being assigned a route shall not be permitted to bid on any future route openings for a period of twelve (12) months unless their route is eliminated. Twelve months begins when the employee is assigned the route. Openings shall be filled according to Section 1 of this Article through the third and fourth openings created. Any other opening shall be filled by Company assignment.

Section 3 In the event that it becomes necessary to terminate or sell a route or combine one route with another, the displaced employee or employees who lose their routes due to this combination or elimination may use their seniority to bump any less senior employee within their currently assigned location. The bumping process shall continue until all other bumped employees have used their seniority and all positions are filled.

Section 4 When an existing route becomes open, the Company shall not split the route by more than ten percent (10%) for bidding purposes unless by mutual agreement with the Union. Bids must truly reflect the stops on the route bid after cut. No route will be cut below $4,000 net sales.

Section 5 Employees off work for more than six (6) months will not have bidding rights.

ARTICLE 12

FUNERAL LEAVE

Section 1 In the event of the death of a parent, spouse, brother, sister, child or grandchild of an employee or those same relatives of an employee's spouse, the employee shall be granted a leave of absence from the day of death to and including, the day of the funeral, not to exceed three working days. In the case of the death of a grandparent of an employee or the grandparent of the employee's spouse, or a brother-in-law or sister-in-law of the employee, the employee shall be granted a leave of absence of one working day. Such paid leave shall be granted to the employee actively at work or scheduled to work when the death occurs. Employees who are laid off, on vacation, off work for illness or not actively at work for any other reason shall not be eligible for any of the benefits set forth in this Section.

Section 2 The Sales Driver or Extra Sales Driver will not receive commissions from the net sales of their route for the days they are off due to an event occurring as stated in Section 1 of this Article. The daily pay will be calculated as one-fifth (1/5) of a vacation week for each day of funeral leave.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 9
550 MAIN ST
RM 3003
CINCINNATI, OH 45202-3271

Agency Website: www.nlrb.gov
Telephone: (513)684-3686
Fax: (513)684-3946

March 13, 2017

Jennifer R. Asbrock, Attorney at Law
Frost, Brown & Todd, LLC
400 W Market St, 32nd FL
Louisville, KY 40202-3363

Re: MIKESELL'S SNACK FOOD COMPANY F/K/A
MIKE-SELL'S POTATO CHIP COMPANY
Case 09-CA-184215

Dear Ms. Asbrock:

This is to advise that I have approved the withdrawal of the 8(a)(3) allegation of the charge, agreeing that there was insufficient evidence that the sale of the routes was discriminatorily motivated.

The remaining allegations that the Employer violated Section 8(a)(5) of the Act remain subject for further processing.

Very truly yours,

Garey Edward Lindsay
Regional Director

cc: John R. Doll - Doll, Jansen & Ford - 111 W First St, Suite 1100
Dayton, OH 45402-1156

International Brotherhood of Teamsters (IBT), General Truck Drivers, Warehousemen, Helpers, Sales, and Service, and Casino Employees, Teamsters Local Union No. 957 - 2719 Armstrong Ln - Dayton, OH 45414-4243

Beth Meeker, HR Manager - Mikesell's Snack Food Company F/K/A Mike-Sell's Potato Chip Company - PO Box 115 - 333 Leo Street - Dayton, OH 45404-0115

ATTACHMENT
6

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	*ELECTRONICALLY FILED*
PLAINTIFF-PETITIONER,	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	
MIKE-SELL'S POTATO CHIP CO.,	**AFFIDAVIT OF JENNIFER ASBROCK IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**
DEFENDANT-RESPONDENT.	

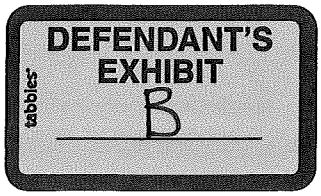
The Affiant, Jennifer Asbrock, after first being duly sworn, hereby states and affirms the following:

1. My name is Jennifer Asbrock. I am of lawful age, and I am competent to attest to the facts stated in this Affidavit, which are true, correct, and based on my own personal knowledge.

2. I am a member of the State Bars of Ohio (#0078157) and Kentucky (#96436) and a Member with Frost Brown Todd LLC, the law firm retained to represent Defendant-Respondent Mike-sell's Potato Chip Company ("Mike-sell's" or "Company") in defense of the Petition for 10(j) Injunction ("Petition") filed by Plaintiff-Petitioner National Labor Relations Board ("NLRB"), as well as Garey Lindsay, Eric Taylor, Linda Finch, and Naomi Clark, acting in their official capacities on behalf of Region 9 of the NLRB (collectively "Petitioner"),[1] seeking to force Mike-sell's to engage in decisional bargaining and produce information requested for that purpose to Charging Party International Brotherhood of Teamsters, Local Union No. 957 ("Union").

3. I have been practicing law since 2004, and my practice has been devoted exclusively to the areas of labor and employment law. I was primarily responsible the above-captioned case for Mike-sell's. I have been involved in all aspects and decisions regarding the defense of this litigation, and I have both supervised the work other attorneys and paralegals and have myself performed a significant portion of the work on this matter, including communicating with client representatives and opposing counsel and drafting

[1] Eric Taylor did not attend the hearing in this matter, but he was listed on this Court's Docket as a "Lead Attorney" and an "Attorney to be Noticed." Conversely, Naima Clark represented Petitioner at the hearing in this matter, although she was not listed on this Court's Docket as representing Petitioner.



various pleadings and legal memoranda in connection with this case. My billing rate on this case has been $325 per hour.

4. I have personal knowledge of the matters set forth herein. My personal knowledge is based upon my personal observations and personal participation in the events described below, as well as my review of the business records of Frost Brown Todd LLC, which are kept in the ordinary course of business.

5. During the period since Frost Brown Todd LLC was retained for this matter, Mike-sell's has been charged and has agreed to pay on an hourly basis for the legal services rendered relating to the defense of this case.

6. Attachment 1 to this Affidavit is an itemized statement of the legal services, including attorneys' fees, costs, and expenses, for which Mike-sell's agreed to pay in connection with its defense in this civil action for the time period from February 1, 2017, to June 26, 2017. The itemization indicates the dates on which legal services were provided or costs and expenses were incurred, the names of the attorney who provided the service or incurred the cost/expense, the type of legal services provided or costs/expenses incurred, the time expended at the applicable billing rate, and the amount of the fees and costs/expenses charged to Mike-sell's.

7. I reviewed the time and charges set forth in the itemized Frost Brown Todd LLC's statements, and I believe the time spent and costs incurred in this matter were reasonable and necessary under the circumstances. I exercised billing judgment to eliminate duplicative attorney and paralegal time entries, as well as to reduce time entries that could be viewed as excessive, duplicative, or that did not add noticeable value to the legal work. As explained in paragraphs 9-10 below, I also exercised billing judgment to apply a $20-per-hour discount on the hourly rates of one Member and one Associate working on this matter. Attachment 1 was created from invoices that were sent to Mike-sell's, and it reflects a true and accurate itemization of attorney and paralegal time spent, and costs and expenses incurred, in defense of this matter between February 1, 2017, and June 26, 2017, less time entries and costs/expenses eliminated in my exercise of billing judgment.

8. As set forth in Pages 1-9 of Attachment 1, the total discounted time billed to Mike-sell's by Frost Brown Todd LLC for this litigation equates to 319.40 hours, totaling discounted fees in the amount of $92,094.00 (reflecting reduced billing rates and eliminated time entries described in paragraph 7 above).[2] As set forth in Pages 10-11 of Attachment 1, the total costs and expenses incurred in defending this civil action equate to $1,786.60.

9. Catherine Frost Burgett is a Member with Frost Brown Todd LLC. She is a member of the State Bar of Ohio (#0082700) and has been practicing law since 2007, primarily in the area of labor and employment law. To promote efficiency, Ms. Burgett performed a substantial amount of the legal research and initial drafting related to Mike-sell's Memorandum in Opposition to the Petition and other related pleadings and legal memoranda necessitated by the Petition and related filings of the NLRB and Union. Her billing rate on this case has been $315-$325 per hour.[3]

10. Jennifer Bame is an Associate with Frost Brown Todd LLC. She is a member of the State Bars of Kentucky (#96953) and Florida (Inactive #0111892) and has been practicing law since 2014. To promote efficiency, Ms. Bame performed a substantial amount of the legal research and initial drafting related to Mike-sell's Memorandum in Opposition to the Petition and other related pleadings and legal memoranda necessitated by the Petition and related filings of the NLRB and Union. Her billing rate on this case has been $205 per hour, which reflects a $20 per-hour discretionary discount from her standard billing rate.

11. Kyle Johnson is a Member with Frost Brown Todd LLC. He is a member of the State Bar of Kentucky (#92574) and has been practicing law since 2012, primarily in the area of labor and

[2] The "discounted time" and "discounted fees" refers to the reduced billing rates and eliminated time entries described in paragraphs 7, 9, and 10 of this Affidavit.

[3] Ms. Burgett's billing rate on this case in March 2017 was $325 per hour, which already reflected a $10 per-hour discretionary discount from her standard billing rate. Once it became clear that Ms. Burgett would devote significant time to the defense of this civil action from a briefing perspective, in April 2017, I exercised my discretion to further reduce her billing rate to $315 per hour on a prospective basis, to account for the need to staff this case with two Members.

employment law. Mr. Johnson has provided specialized counsel on discrete and nuanced issues of litigation strategy relating to the defense of this case. His billing rate on this case has been $285 per hour.

12. Richard S. Cleary is a Member with Frost Brown Todd LLC. He is a member of the State Bar of Kentucky (#12670) and has been practicing law since 1981, exclusively in the area of labor and employment law. Mr. Cleary has provided specialized counsel on discrete and nuanced issues of labor law and litigation strategy relating to defense of this case. His billing rate on this case has been $520 per hour.

13. Christine A. Hahn is a Senior Paralegal with Frost Brown Todd LLC, and she provides litigation support. She has been a paralegal since 1994, when she received her paralegal certificate from Sullivan University. Ms. Hahn helped with the final preparation of Affidavits and other Exhibits, as well as the filing of documents in this case. Her billing rate on this case has been $160 per hour.

14. The billing rates that Frost Brown Todd LLC charged Mike-sell's on this matter were reasonable and generally below the average rates charged by attorneys in the same geographic area with similar education and experience. Attachment 2 is a true and complete copy of a July 2013 article from the Cincinnati Business Courier, which summarizes the results of a legal fee survey conducted by TyMetrix (a legal billing and practice management solutions company) for the years of 2010, 2011, and 2012. The survey provides average billing rates for associates and partners in Cincinnati, Ohio, in specialized practice areas, and it also provides the average billing rates for partners in Ohio's four largest cities and Kentucky's two largest cities. According to the survey results, all but one of the 2017 billing rates for the Frost Brown Todd LLC attorneys who worked on this case are well below even the 2012 averages for their respective titles and practice areas.

15. If the Court is not inclined to award the already-discounted attorneys' fees, costs, and expenses described in paragraph 8 and Attachment 1 of this Affidavit pursuant to 28 U.S.C. § 1927 and the Court's inherent authority, then Mike-sell's alternatively seeks fees in the further reduced amount of $62,884.80, which equates to $198 per hour for 317.60 hours billed by attorneys, and $160 per hour for

1.8 hours billed by a paralegal. This reflects the statutory maximum rate of $125 per hour under the Equal Access to Justice Act ("EAJA"), with adjustments to account for increases in the cost of living since March 1996. *See, e.g., Sorenson v. Mink*, 239 F.3d 1140, 1145, 1148 (9th Cir. 2001) (citing 28 U.S.C. § 2412(d)(2)(A) and explaining calculation methodology for adjusting rates based on current consumer price index for urban consumers). The billing rate of $198 per hour is the maximum statutory rate permitted under the EAJA for 2016,[4] calculated by the federal government and appears on the National Transportation Safety Board website at www.ntsb.gov/legal/Documents/EAJA-maximum-rates.pdf (Last accessed June 26, 2017). Attachment 3 is a true and complete copy of the EAJA fee calculations each year, as adjusted for inflation, that are posted on the National Transportation Safety Board website.

AFFIANT FURTHER SAYETH NAUGHT.

Jennifer R. Asbrock, Esq.
Counsel for Mike-sell's Potato Chip Company

STATE OF KENTUCKY)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by Jennifer R. Asbrock on this 26th day of June, 2017.

Notary Public, State at Large

My Commission Expires: May 3, 2020

EN11783.Public-11783 4832-8895-1115v1

[4] According to the federal government, "CPI figures for 2017 will not be available until sometime in 2018," so "[u]ntil then, awards for services performed in 2017 will be based on the 2016 CPI." *See* www.ntsb.gov/legal/Documents/EAJA-maximum-rates.pdf (Last accessed June 26, 2017).

FEES AND COSTS FOR MIKE-SELL'S EAJA MOTION

FEES

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
03/12/17	JRA	Review and analyze Sixth Circuit standard for 10(j) injunctions; begin drafting position statement on 10(j) relief.	0.70	325.00	227.50
03/13/17	CFB	Confer with J. Asbrock re facts of case in preparation for likely 10(j) injunction. (No Charge)	0.50	0.00	0.00
03/13/17	JRA	Finish and file position statement in response to Regional Director's proposal to seek 10(j) injunctive relief.	2.40	325.00	780.00
03/17/17	RSC	Two telephone conferences with B. Kearney, Associate General Counsel of NLRB re intent to seek 10(j) relief; conference with J. Asbrock re my conversation with B. Kearney; review proposed formal settlement agreement in preparation for calls with B. Kearney; review 11/2016 position statement on sale of routes and 3/2017 position statement on 10(j) relief.	3.50	520.00	1,820.00
03/21/17	CFB	Begin review of file in preparation for expected 10(j) Petition.	2.40	325.00	780.00
03/21/17	JRA	Conference with R. Cleary re report/explanation from B. Kearney at Division of Advice and re strategy for responding to Complaint, expected 10(j) Petition, and Formal Settlement Stipulation proposed by Board; email correspondence with C. Shive re same; phone conference with NLRB Supervising Attorney re potential for flexibility in Formal Settlement and/or relief sought, as well as expected timing for filing of 10(j) Petition; review and analyze additional Board law to refute 10(j) arguments, as well as new arguments raised by Division of Advice.	2.60	325.00	845.00
03/21/17	RSC	Conference with J. Asbrock re 10j and formal settlement agreement; review draft agreement.	0.50	520.00	260.00

ATTACHMENT 1

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
03/22/17	JRA	Continue reviewing and analyzing additional Board law to refute 10(j) arguments, as well as new arguments raised by Division of Advice; prepare for and attend conference call with C. Shive, P. Kazer, P. McNiel, and B. Meeker to discuss strategy for responding to NLRB Complaint and proposed Formal Settlement Stipulation; conferences and email correspondence with R. Cleary re litigation strategy; draft Answer to NLRB Complaint	6.70	325.00	2,177.50
03/22/17	RSC	Conference with J. Asbrock re 10(j) issues and possibility of informal settlement option.	0.50	520.00	260.00
03/23/17	CFB	Continue review of file in preparation for filing of 10(j) Petition.	1.80	325.00	585.00
03/23/17	JRA	Continue drafting Answer to NLRB Complaint; email correspondence with R. Cleary and C. Burgett re strategy for 10(j) proceedings and possible EAJA request for attorney's fees.	2.20	325.00	715.00
03/23/17	RSC	Emails to and from J. Asbrock re 10(j) issues and strategy; review affirmative defenses.	0.50	520.00	260.00
03/24/17	CFB	Telephone call with J. Asbrock re factual background leading to 10(j) Petition. (No Charge)	1.00	0.00	0.00
03/24/17	JRA	Continue drafting Answer to ULP Complaint, incorporating revisions specific to expected 10(j) Petition; review and analyze the NLRB's Section 10(j) Manual in preparation for litigation strategy; email correspondence with C. Shive and P. Kazer re NLRB's interference with independent distributor relationships; email correspondence with R. Cleary re same; email correspondence and phone conference with C. Burgett re case background, bargaining history, other Board litigation, and strategy for anticipated 10(j) proceeding.	4.60	325.00	1,495.00
03/24/17	RSC	Emails and conferences with J. Asbrock re contacting GC staff in D.C. re 10(j); emails re potential action against Board.	0.60	520.00	312.00
03/27/17	CFB	Continue review of file in preparation for meeting with client re expected 10(j) Petition.	1.00	325.00	325.00
03/27/17	RSC	Emails with J. Asbrock re 10(j) procedures; conference with J. Asbrock re same.	0.40	520.00	208.00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
03/28/17	CFB	Review and revise response to union request to bargain, with special consideration to possible effect on expected 10(j) proceeding; confer with client re same; confer with client re strategy for responding to expected 10(j) Petition filed by NLRB.	2.30	325.00	747.50
03/29/17	CFB	Evaluate legal strategy for responding to 10(j) Petition; draft outline for same; review NLRB case handling memo in order to prepare strategy for responding effectively to 10(j) Petitions filed by Board.	3.50	325.00	1,137.50
04/04/17	CFB	Telephone call with NLRB re anticipated Petition for 10(j) injunction.	0.40	315.00	126.00
04/05/17	CFB	Telephone call with NLRB re Company's position that a 10(j) injunction is not warranted.	0.60	315.00	189.00
04/07/17	CFB	Review email from NLRB re 10(j) Petition approval received from the NLRB's Injunction Litigation Branch; telephone call with Board attorney re same; draft email to client re same.	0.80	315.00	252.00
04/10/17	CFB	Telephone call with NLRB attorney re formal settlement proposal and Petition for 10(j) injunction; email client re same.	0.70	315.00	220.50
04/10/17	JLB	Draft Memo in Opposition to Petition for 10(j) Injunction re sale of routes.	6.10	205.00	1,250.50
04/10/17	JRA	Email correspondence with C. Shive, P. Kazer, B. Meeker, P. McNiel, and C. Burgett re timeline and strategy for respond to expected 10(j) Petition.	0.50	325.00	162.50
04/11/07	JLB	Strategize response to Petition for 10(j) Injunction. (No Charge)	0.10	0.00	0.00
04/11/17	CFB	Telephone call with NLRB re settlement proposal and status of expected 10(j) Petition; strategize with J. Bame re Memo in Oppose to 10(j) Petition. (No Charge)	1.60	0.00	0.00
04/11/17	JLB	Research case law to support Memo in Opposition to 10(j) Petition.	2.20	205.00	451.00
04/11/17	JLB	Continue drafting Memo in Opposition to 10(j) Petition.	2.40	205.00	492.00
04/12/17	CFB	Review and evaluate Petition for 10(j) Petition; draft email to client re same; begin preparing to respond to same.	1.50	315.00	472.50
04/12/17	JLB	Continue drafting Memo in Opposition to 10(j) Petition.	8.00	205.00	1,640.00
04/12/17	JRA	Email correspondence with C. Shive, P. Kazer, B. Meeker, and P. McNiel re 10(j) filings received from NLRB; email correspondence with C. Burgett and J. Bame re same. (No Charge)	0.30	0.00	0,00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
04/12/17	RSC	Review 10(j) Petition from NLRB and strategize with J. Asbrock re response to same.	0.80	520.00	416.00
04/13/17	CFB	Review emails related to NLRB settlement proposal and documents requested during investigation, in preparation for drafting segment of Memorandum in Opposition to 10(j) Petition; draft timeline for use in case; review and respond to emails from client re response to petition for 10(j) injunction. (No Charge)	1.30	0.00	0.00
04/13/17	JLB	Draft Memo in Opposition to 10(j) Petition.	9.10	205.00	1,865.50
04/14/17	CFB	Telephone call re status of Court's Show Cause order. (No Charge)	0.20	0.00	0.00
04/14/17	JLB	Revise Memo in Opposition to 10(j) Petition. (No Charge)	1.90	0.00	0.00
04/17/17	CFB	Revise Memo in Opposition to 10(j) Petition.	9.00	315.00	2,835.00
04/17/17	JRA	Conferences and email correspondence with C. Burgett, J. Bame, and C. Shive re litigation strategy; review and revise Memorandum in Opposition to 10(j) Petition. (No Charge)	1.00	0.00	0.00
04/18/17	JLB	Research local rules for filing response to NLRB Petition in Southern District of Ohio. (No Charge)	0.30	0.00	0.00
04/18/17	JRA	Phone conference with Reporter from Dayton Daily News; phone conference with C. Shive re same; email correspondence with B. Meeker and NLRB Agent re Regional Director's request for NLRB Form 5554; review and revise Memorandum in Opposition to 10(j) Petition.	9.3	325.00	3,022.50
04/19/17	JLB	Research local rules re filing in Southern District of Ohio; phone conference with Judge's law clerk re filing deadlines. (No Charge)	.3	0.00	0.00
04/19/17	JLB	Research substantial evidence requirements re 10(j) Petition. (No Charge)	.3	0.00	0.00
04/19/17	JRA	Review and revise Memorandum in Opposition to 10(j) Petition.	3.90	325.00	1,267.50
04/20/17	JLB	Draft Answer to 10(j) Petition.	1.40	205.00	287.00
04/20/17	JLB	Research case law re consideration of labor costs in decision to close/relocate business units and recreation of undue hardship on innocent third parties for use in Memo in Opposition to 10(j) Petition.	1.10	205.00	225.50
04/20/17	JRA	Review and revise Memorandum in Opposition to 10(j) Petition.	8.50	325.00	2,762.50

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
04/21/17	CFB	Draft witness outlines for interviews of independent distributors.	1.40	315.00	441.00
04/21/17	JLB	Research effect of injunction on third parties for Memo in Opposition to 10(j) Petition.	1.60	205.00	328.00
04/24/17	JRA	Review and revise Answer to 10(j) Petition; prepare for and attend witness interview via conference call with P. Kazer and T. Morris.	5.50	325.00	1,787.50
04/25/17	CLC	Assist with revisions to Answer to 10(j) Petition for Injunction and electronic filing and coordination of service of same. (No Charge)	2.20	0.00	0.00
04/25/17	JRA	Email correspondence with C. Shive, P. Kazer, B. Meeker, and P. McNiel re strategy for Answer to 10(j) Petition; review and analyze P/L figures for possible presentation at upcoming hearing; review, revise, finalize, and file Answer to 10(j) Petition; coordinate witness preparation sessions for upcoming hearing; continue drafting Memorandum in Opposition to Petition for 10(j) Injunction.	6.80	325.00	2,210.00
04/26/17	JRA	Email correspondence with P. McNiel, C. Shive, and P. Kazer re revisions to P/L figures and itemized breakdown of cost savings, new revenue, and reallocation of capital resulting from four routes sold in 2016; continue drafting Memorandum in Opposition to 10(j) Petition; prepare for and attend witness interview via conference call with M. Plummer and L. Krupp.	5.60	325.00	1,820.00
04/27/17	CFB	Draft audit response. (No Charge)	.4	0.00	0.00
04/27/17	JLB	Revise Memo in Opposition to 10(j) Petition.	3.40	205.00	697.00
04/28/17	JLB	Revise Memo in Opposition to 10(j) Petition.	1.0	205.00	205.00
04/30/17	CFB	Review case law in preparation for drafting trial outlines for supervisors and independent distributors.	2.0	315.00	630.00
05/01/17	JRA	Continue drafting Memorandum in Opposition to Petition for Injunction; email correspondence with traditional labor partners re Shive and P. Kazer re additional details needed about sales and combinations of routes.	8.00	325.00	2,600.00
05/01/17	RSC	Emails with J. Asbrock re important strategy decision re the presentation of evidence at 10(j) hearing and All trial.	0.30	520.00	156.00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
05/02/17	CFB	Draft trial outline for independent distributors and supervisors.	4.00	315.00	1,260.00
05/02/17	JLB	Research filing requirements for Memorandum in Opposition in Southern District of Ohio. (No Charge)	0.20	0.00	0.00
05/02/17	JLB	Draft Table of Contents and Summary of Legal Argument for Memorandum in Opposition to Petition for 10(j) Injunction.	3.30	205.00	676.50
05/02/17	JRA	Continue drafting Memorandum in Opposition to Petition for 10(j) Injunction.	14.00	325.00	4,550.00
05/03/17	CAH	Review, revise, finalize, and file Memorandum in Opposition to Petition for 10(j) Injunction.	1.8	160.00	288.00
05/03/17	JLB	Research Sixth Circuit case law to support Memorandum in Opposition to Petition for 10(j) Injunction. (No Charge)	.5	0.00	0.00
05/03/17	JLB	Revise Summary of Legal Argument and Table of Contents for Memorandum in Opposition to Petition for 10(j) Injunction; finalize citations to cases and affidavits and prepare document for filing; prepare Service emails to NLRB and Union.	2.40	205.00	492.00
05/03/17	JRA	Review, revise, and finalize Memorandum in Opposition to Petition for 10(j) Injunction; draft Affidavits for P. Kazer and M. Plummer; phone conferences and email correspondence with P. Kazer, P. McNiel, and M. Plummer re revisions to various factual contentions.	17.10	325.00	5,557.50
05/04/17	CFB	Review Motion to Intervene filed by Union, draft Company's Response to same.	1.50	315.00	472.50
05/05/17	CFB	Review Motion for Adjudication on Affidavits filed by NLRB; confer with J. Asbrock re same; begin research re same.	1.50	315.00	472.50
05/05/17	JLB	Conference with J. Asbrock to strategize re calculation methods to be used to assess financial impact of Company's decision to adopt independent distributor business model for four routes in question. (No Charge)	0.70	0.00	0.00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
05/05/17	JRA	Email correspondence with L. Mapp, P. Kazer, C. Shive, B. Meeker, and P. McNiel re additional facts and information needed to prepare for upcoming 10(j) hearing; prepare, review, and/or analyze summary exhibits for use at 10(j) hearing; review and analyze NLRB's Motion for Adjudication on Affidavits; email correspondence and phone conference with C. Burgett re strategy for responding to same; contact Judge's law clerk to request conference call on NLRB's and Union's pending Motions; email correspondence with C. Shive, P. Kazer, P. McNiel, and B. Meeker re NLRB's latest Motion and strategy for responding to same.	4.10	325.00	1,332.50
05/05/17	KDJ	Conference with J. Asbrock to strategize re calculation methods to be used to assess financial impact of Company's decision to adopt independent distributor business model for four routes in question.	0.50	285.00	142.50
05/06/17	JRA	Prepare, review, and/or analyze financial/strategic summary exhibits for use at upcoming 10(j) hearing; email correspondence with B. Meeker and P. Kazer re additional facts and information needed for 10(j) hearing.	3.00	325.00	975.00
05/07/17	CFB	Research case law to rebut NLRB's Motion for Adjudication on Affidavits; draft research memorandum to J. Asbrock re same.	2.90	315.00	913.50
05/08/17	JLB	Draft Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits.	2.40	205.00	492.00
05/08/17	JRA	Continue preparing 10(j) hearing outline, direct and cross examinations for witnesses, and hearing exhibits; review and revise Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits.	8.90	325.00	2,892.50
05/09/17	CFB	Review and revise Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits. (No Charge)	0.40	0.00	0.00
05/09/17	CLC	Assist with proofing and preparing Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits; evening electronic filing of same upon approval from client. (No Charge)	1.50	0.00	0.00
05/09/17	JLB	Research case law to support Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits.	3.40	205.00	697.00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
05/09/17	JRA	Continue preparing 10(j) hearing outline, direct and cross examinations for witnesses, and hearing exhibits; review, revise, and finalize Memorandum in Opposition to NLRB's Motion for Adjudication on Affidavits.	7.60	325.00	2,470.00
05/10/17	CLC	Follow up on filing of Memorandum in Opposition and process Service emails for NLRB General Counsel. (No Charge)	0.20	0.00	0.00
05/10/17	JRA	Prepare for and attend witness preparation sessions with T. Morris, L. Krupp, M. Plummer, and P. Kazer; review and revise 10(j) hearing outline and direct and cross examination outlines based on witness prep sessions; prepare additional exhibits.	16.50	325.00	5,362.50
05/11/17	CFB	Draft cross examination outlines for Union witnesses.	3.10	315.00	976.50
05/11/17	JRA	Prepare for and attend witness preparation sessions with P. Kazer and M Plummer; prepare opening statement and closing argument for 10(j) hearing; review, revise, and finalize direct and cross examination outlines as well as hearing exhibits.	17.80	325.00	5,785.00
05/12/17	JRA	Prepare for and attend 10(j) hearing; attend post-hearing debrief meeting with P. Kazer; phone conference with C. Shive re evidence/testimony elicited at 10(j) hearing and the relative likelihood of possible rulings from the Court.	9.40	325.00	3,055.00
05/24/17	JLB	Review entire 10(j) hearing transcript in preparation for pretrial meeting with P. Kazer, to provide assessment and analysis of relative strengths and weaknesses of witnesses. (No Charge)	2.40	0.00	0.00
05/26/17	JLB	Review and analyze Order denying Petition for 10(j) Injunction. (NoCharge)	0.40	0.00	0.00
05/26/17	JLB	Research EAJA and awarding of attorneys' fees to employers following the denial of 10(j) injunctions sought by the NLRB.	1.60	205.00	205.00
05/26/17	JRA	Review and analyze Court Order denying NLRB's Motion for 10(j) Injunction; email correspondence with C. Shive and office conference with J. Bame re strategy for seeking attorneys' fees under EAJA; review and analyze recent EAJA caselaw in NLRB context; review and analyze 10(j) transcript.	10.80	325.00	325.00
05/26/17	JRE	Legal research re EAJA filing in 10(j) injunction context. (No Charge)	1.10	0.00	0.00

DATE	TIMEKEEPER	DESCRIPTION OF SERVICES	HOURS	HOURLY RATE	AMOUNT BILLED
06/06/17	JLB	Begin researching case law re motion for attorneys' fees under Equal Access to Justice Act for prevailing parties following Petition for 10(j) Injunction; begin drafting motion for attorneys' fees.	5.50	225.00	1,127.50
06/07/17	JLB	Draft Motion for Attorneys' fees under Equal Access to Justice Act following denial of government's petition for 10(j) injunction.	1.10	225.00	225.50
06/12/17	JLB	Draft Motion for Attorneys' Fees re court's denial of 10(j) Injunction and Equal Access to Justice Act.	5.60	225.00	1,148.00
06/13/17	JLB	Research case law re awarding attorneys' fees following denial of 10(j) injunction; continue drafting motion for attorneys' fees.	8.10	225.00	1,660.50
06/13/17	JRA	Conference with J. Bame re strategy for EAJA Application for Fees.	0.70	325.00	227.50
06/14/17	JRA	Begin reviewing and revising EAJA Application for Fees.	0.40	325.00	130.00
06/24/17	JRA	Review and revise EAJA Motion for Attorneys' Fees, Costs, and Expenses.	9.10	325.00	2,957.50
06/24/17	JRA	Prepare Affidavits and Attachments to accompany EAJA Motion for Attorneys' Fees, Costs, and Expenses; review, revise, finalize, and file EAJA Motion for Attorneys' Fees, Costs, and Expenses.	10.70	325.00	3,477.50
		TOTAL FEES			**92,094.00**

COSTS

DATE	DESCRIPTION OF COST INCURRED	AMOUNT
03/27/17	Postage	.67
04/25/17	Postage	.67
04/25/17	Reproductions Duplex	1.84
05/04/17	Postage	1.40
05/09/17	After-hours - Secretarial Support for Trial Preparation	12.50
05/10/17	Postage	.67
05/10/17	Other- J. Asbrock – Hearing in USDC	2.25
05/10/17	Lodging for two nights -J. Asbrock – hearing in USDC	250.09
05/11/17	After-hours - Secretarial Support for Trial Preparation	12.50
05/12/17	Meals – Hotel Dinner J. Asbrock – Hearing in USDC	18.92
05/12/17	Meals – Hotel Breakfast J. Asbrock – Hearing in USDC	11.88
05/12/17	Lodging – one night J. Asbrock – Hearing in USDC	178.94
05/23/17	Transcript – of Preliminary Injunction hearing on 5/12/17	1,057.30
05/30/17	Transcript – Word Index for Transcript of Peliminary Injunction Hearing on 5/12/17	130.95
05/31/17	Pacer Client Charges for May 2017	4.50
06/12/17	Reproductions Duplex	12.96
06/12/17	Reproductions Duplex	13.52
06/12/17	Reproductions Duplex	13.52
06/12/17	Reproductions Duplex	12.96
06/12/17	Reproductions Duplex	7.28
06/12/17	Reproductions Duplex	7.28

DATE	DESCRIPTION OF COST INCURRED	AMOUNT
06/13/17	Reproductions - 340 pages	34.00
	TOTAL COSTS	**$1,786.60**

From the Cincinnati Business Courier:
http://www.bizjournals.com/cincinnati/news/2013/07/12/heres-what-cincinnati-lawyers-charge.html

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Here's what Cincinnati lawyers charge compared to their neighbors

Jul 12, 2013, 11:50am EDT Updated: Jul 12, 2013, 4:09pm EDT

Cincinnati attorneys charge the least out of Ohio's three largest cities, but they still take home more than Dayton lawyers.

Cincinnati attorneys charge the least out of Ohio's three largest cities, but they still take home more than Dayton lawyers, according to a new report.

According to The 2013 Real Rate Report by TyMetrix, the average rate charged by a partner at a Cincinnati law firm in 2012 was $362.90 per hour, while the average associate charged $219.85. The report surveyed rates that law firms use in billing corporate and insurance company in-house legal departments.

That's compared to the $410.52 and $388.85 charged by partners in Cleveland and Columbus respectively, and the $256.52 and $240.31 charged by associates in those cities.

Dayton partners charged $353.20 on average, while associates charged $207.32.

Legal services in Kentucky appear to be cheaper, as partners in Louisville and Lexington charged on average $338.66 and $321.30 respectively, while associates in those cities charged $206.35 and $207.41 on average.

"Those rates probably tend to skew high, since many in-house lawyers hire big firm lawyers who bill at above-average rates," said Tom James, an attorney with Sanders & Associates in Mason. "That means the averages probably aren't truly representative of the market average for all clients, most of whom I suspect typically pay less."

The report also broke down the average hourly rate charged by sector, and the highest rates charged by attorneys in Cincinnati last year were charged by partners in the finance and securities sector at $399.02. The highest rates charged by associates were in the employment and labor sector at $225.89 per hour (the report didn't have data for associates practicing in the finance and security areas).

Here's what Cincinnati attorneys charge in different sectors:

- **Finance and securities:** partners - $399.02, associates - no data
- **Employment and labor:** partners - $377.17, associates - $225.89

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- **Non-insurance company litigation:** partners - $367.25, associates - $212.42
- **Corporate and general:** partners - $352.84, associates - $225.24
- **Real estate:** partners - $350.00, associates - no data
- **Litigation:** partners - $300.22, associates - $185.24

The report had no data on rates charged by attorneys in the regulatory and government, mergers and acquisitions, or intellectual property fields in Cincinnati.

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City	2012 (Avg. for partners)	2011 (Avg. for partners)	2010 (Avg. for partners)
Cincinnati	$362.90	$357.15	$343.71
Cleveland	$410.52	$389.64	$373.33
Columbus	$388.85	$369.82	$357.63
Dayton	$353.20	$325.00	$369.40
Lexington	$321.30	$328.05	$328.58
Louisville	$338.66	$322.96	$319.83

Records 1-6 of 6

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Online Database by Caspio

Andy Brownfield
Reporter
Cincinnati Business Courier

HOURLY FEES FOR SERVICES FOR EAJA CLAIMS
(reference: 49 C.F.R. § 826.6)

Year	CPI[1]	Maximum allowable hourly rate[2]
1981	90.9	$75
1982	96.5	$80
1983	99.6	$82
1984	103.9	$86
1985	107.6	$89
1986	109.6	$90
1987	113.6	$94
1988	118.3	$98
1989	124.0	$102
1990	130.7	$108
1991	136.2	$112
1992	140.3	$116
1993	144.5	$119
1994	148.2	$122
1995	152.4	$126
1996	156.9	$130
1997	160.5	$133
1998	163.0	$134
1999	166.6	$137
2000	172.2	$142
2001	177.1	$146
2002	179.9	$149
2003	184.0	$152
2004	188.9	$156
2005	195.3	$161
2006	201.6	$167
2007	207.342	$171
2008	215.303	$178
2009	214.537	$177
2010	218.056	$180
2011	224.939	$185
2012	229.594	$190
2013	232.957	$192
2014	236.736	$195
2015	237.017	$196
2016	240.007	$198[3]

[1]Under 49 C.F.R. § 826.6, "The CPI to be used is the annual average CPI, All Urban Consumers, U.S. City Average, except where a local, All Item Index is available." CPI figures listed below are the All Urban Consumers, U.S. City Average figures.

[2]The maximum hourly rates calculated here are based on the All Urban Consumers, U.S. City Average CPI figures provided in the preceding column, *and rounded off to the nearest dollar*. The maximum hourly rate is calculated using the formula found in 49 C.F.R. § 826.6 as follows:

a) Take the CPI rate for the year in which the services in question were performed;
b) Divide that rate by 90.9 (the rate for the base year);
c) Then multiply the result by $75.

Example: For services performed in 2010 —
CPI for 2010 is 218.056;
Divide 218.056 by 90.9 = 2.40;
Multiply 2.40 by $75 = $180.

[3]CPI figures for 2017 will not be available until some time in 2018. Until then, awards for services performed in 2017 [illegible]ased on the 2016 CPI. Please also note that the Department of Labor began in 2007 to calculate the CPI to [illegible]ths of a percentage point, rather than tenths, as was its practice in previous years.

ATTACHMENT
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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-REGIONAL DIRECTOR,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	
DEFENDANT-RESPONDENT.	)	**PROPOSED ORDER RE MOTION FOR ATTORNEYS' FEES, COSTS, AND OTHER EXPENSES**

Upon Motion by the Defendant-Respondent, for good cause shown, and with the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED THAT, Defendant-Respondent Mike-sell's Potato Chip Company's Motion for Attorneys' Fees, Costs, and Other Expenses incurred in the defense of this action, is GRANTED as follows:

In the amount of $_____ for reasonable attorneys' fees; and

In the amount of $_____ for costs and other expenses.